IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1865

CHARLES DEBOLES,

Petitioner

v.

TRANS WORLD AIRLINES, INC.,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 142, IAMAW, AFL-CIO; LOCAL LODGE 1776, IAMAW, AFL-CIO

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioner Charles Deboles respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 31, 1977.

THE OPINIONS BELOW.

Neither the opinion of the Court of Appeals nor the opinion of the District Court for the Eastern District of Pennsylvania is as yet reported in the official reports. The decisions are unofficially reported at 81 CCH Lab. Cases ¶ 13,158 and 78 CCH Lab. Cases ¶ 11,397, respectively. Copies of both Opinions are attached to this Petition in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 31, 1977, and this Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a Union satisfies its duty of fair representation when it agrees with the employer to represent a group of employees not yet hired, and then instigates an agreement with the employer which denies to the members of that group the seniority rights which all of the Union's other members enjoy.

2. Whether a Union satisfies its duty of fair representation when it hides from a group of its members the facts concerning the denial to them of equal seniority rights, by admitted lies and misrepresentations.

3. Whether a Union satisfies its duty of fair representation when it rejects the employer's proposal to provide equal seniority rights to a minority group of employees for the sole reason that the majority of the Union's members opposes the proposal.

4. Whether a Union may insulate itself from liability for arbitrarily denying a minority group of employees equal seniority rights, by submitting the matter to majority vote of all Union members, thereby using the contract ratification process to defeat a minority group's claim for equal treatment.

5. Whether an Employer may escape liability to a minority group of its employees when it knowingly enters into agreements with the Union, which discriminate against the minority group.

STATUTES INVOLVED.

United States Code, Title 45 (Railway Labor Act):
§ 152 (Fourth)

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its em-

ployees while engaged in the business of a labor organization."

By analogy, also involved is Title 29, United States Code (National Labor Relations Act):

§ 159(a)

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

STATEMENT OF THE CASE.

This is a class action certified under F. R. C. P. 23(b)(2),[1] which was brought by those employees of Trans World Airlines ("TWA") who were originally hired at the Kennedy Space Center ("KSC") in Florida, and who continue to be employed by the company. The jurisdiction of the District Court was invoked because the issues involve federal questions concerning the duty of fair representation under the Railway Labor Act: 45 U. S. C. § 152 (Fourth).

For many years, the exclusive collective bargaining representative of TWA's ground employees has been the International Association of Machinists and Aerospace Workers, ("IAM"), pursuant to a certification issued by the National Mediation Board (753a, 1433a). The collective bargaining agreements negotiated by TWA and the IAM have accorded the IAM members "system seniority", by which is meant nationwide job classification seniority (128a-30a, 1436a). This affords an employee the right to displace a junior employee anywhere in the country in the event he faces lay-off where he is employed, and gives him the right to transfer to openings in his classification, wherever they may be (129a-30a, 1439a-41a). System seniority begins to accrue from the date the employee begins work in his classification (1436a).

In 1963, TWA was the successful bidder on the contract with the National Aeronautics and Space Administration to operate the Kennedy Space Center in Florida. To avoid problems with other Unions, it offered the IAM the representation of the employees it expected to employ there (135a-38a, 278a-79a).[2] Negotiations on an agree-

1. *Deboles v. Trans World Airlines, Inc.,* 350 F. Supp. 1274 (E. D. Pa., 1972).

2. The legality of this agreement is open to substantial question. *Pan American World Airways v. United Brotherhood of Car-*

(Cont'd on p. 6)

ment to supplement the basic collective bargaining agreement followed. In the course of the negotiations, the Union itself proposed a clause denying system seniority to new employees hired at KSC, although permitting transferees from other TWA locations performing exactly the same jobs to continue to accrue it while there (393a-94a; 174a-75a; 1483a); the proposal was agreed to by TWA, which itself had desired to "segregate" the KSC operation, but had had no fixed proposal to accomplish that segregation (139a-40a; 169a-70a; 199a; 204a). Later, when the persons hired at KSC questioned this provision, they were told by the IAM that NASA had insisted upon it (488a-89a, 580a-81a).

The local agreement also provided that employees with "system seniority" could not exercise their system seniority to displace employees at KSC (1483a). It has been argued in this litigation that this was a type of "trade-off" for the denial of system seniority to persons hired at KSC. However, this argument is challenged by the fact that, at the time the events involved in the case actually occurred, the efforts of the KSC employees to obtain system seniority for themselves also involved the removal of the clause which was allegedly protecting them (507a-08a, 1632a). That clause was but a further effort by the Union to keep the KSC employees separated from the employees not hired in Florida for the protection of the non-Florida employees (167a-68a, 1535a).

When the national agreement came up for renegotiation in 1966, the KSC employees requested the IAM to

2. (Cont'd.)
penters, 324 F. 2d 217 (9th Circ. 1963), *cert. den.* 376 U. S. 964 (1964). Since TWA had lost the KSC contract by the time suit started, this question is material only to the options the KSC employees might have had, had they been told the truth about the negotiations, discussed *infra*.

propose equality of seniority for all of its TWA employee-members; the IAM did not even submit the proposal, however (490a, 1488a-89a). When the KSC employees discovered this, they tried to secure it in local negotiations, but were told by the IAM that it would have to be discussed at the national bargaining table, where IAM would obtain it (493a-501a). In fact, the IAM never pressed the issue at the national bargaining table (290a); when the KSC employees asked IAM representatives why equality of seniority had not been secured, they were told that TWA's adamant opposition had defeated the proposal (501a).

In 1968, negotiations began again on the national contract, which eventually was agreed to in January, 1970. At the insistence of the KSC employees—who now numbered 1200—the IAM submitted a proposal for equality of seniority (1518a-19a, Item No. 2); significantly, TWA's own written opening proposals contained an offer to give system seniority to the KSC employees accruing from the date they had entered their classifications (150a-51a, 309a-10a, 369a, 1492a-93a ¶ 27). Twice during the negotiations—in June, 1969, and in October, 1969—TWA resubmitted the proposal (349a-50a, 864a-71a, 910a-12a, 1557a-61a). It was understood at KSC and at other TWA locations that an agreement had been reached (515a-16a, 709a).

At that point, opposition began to surface from IAM members at non-KSC locations who had benefitted from the restriction on the KSC employees' seniority, and who feared that they might be displaced if the KSC employees were given equal seniority (1109a-10a). The IAM negotiating team believed this opposition might defeat the entire contract; as a result, the IAM dropped the proposal (1051a-55a), on the theory that "[s]ometimes the majority

have to override the minority" (1057a). At the eleventh hour of the negotiations, the IAM submitted a revised proposal which gave a limited system seniority to KSC employees according them no credit for prior service with the company, but giving them initial accrual dates as of the date the contract was to be signed (985a, 1468a)—i.e., they were treated for seniority purposes as if they had been hired on the date the contract was to be signed, and as a result were placed behind all other existing TWA employees, no matter how recently the latter had been hired.

When the KSC employees questioned the IAM as to the seniority agreement, the IAM stoutly insisted that TWA's opposition had defeated equal seniority, and that the Union was forced to accept the limited seniority in order to preserve the balance of a good contract (1115a, 1154a). Relying upon the word of their national leaders, the KSC employees voted for the contract (397a), which was ratified overwhelmingly on a national basis (1728a).

It was not until 10 months later that the KSC employees discovered the truth about the negotiations. Until then, they had relied for 7 years on their national Union's good faith, and its assurances about what had occurred during negotiations. By the time the truth was discovered, it was too late to do anything about it; within 5 months, TWA lost the KSC contract (552a-54a) and the KSC employees were either immediately laid off, or were transferred to other locations where they suffered lay-offs shortly thereafter. The lay-offs would not have occurred had they had system seniority on the same basis as the other TWA employees represented by the IAM (see *e.g.* 401a-02a, 907a, 933a).

The District Court held that the IAM had breached its duty of fair representation by the lies and misrepresentations which it had made to the KSC employees over the years it had represented them, a course of conduct which it described as a "web of deceit" (Attached Appendix, p. A21). It held, however, that the agreements which restricted the KSC employees seniority were themselves not violations of the IAM's duties, because they were the product of TWA's desire for a stable work force at KSC (*Id.* pp. A5, A17). It therefore entered a verdict in favor of the Petitioners against the IAM, and entered judgment in favor of TWA against the Petitioners.

On cross-appeals to the Court of Appeals,[3] that Court affirmed the District Court's holding that the agreements did not constitute a violation of the IAM's duty to its KSC members; however, it reversed the District Court's verdict against the IAM, on the ground that no harm had been done to the Petitioners by the lies and misrepresentations, since they represented such a minority of the total Union membership that the contracts would have been ratified over their opposition had the truth been told (*Id.* p. A54).

3. The District Court had entered final judgment for TWA, and Petitioners appealed that judgment under 28 U. S. C. § 1291. However, liability issues had earlier been severed from damage issues, and thus the Plaintiffs' verdict against the IAM was not a final judgment. The District Court certified its verdict against the IAM under 28 U. S. C. § 1292(b) and the Court of Appeals thereafter accepted interlocutory cross-appeals from that verdict. The Petitioners appealed the holding that the agreements themselves did not violate the IAM's duty of fair representation, and the IAM appealed the verdict based upon the Court's findings of dishonesty.

REASONS FOR GRANTING THE WRIT.

1. The Case Presents Important Questions of Federal Law Concerning the Duties Owed by Unions to Their Members.

The duty of fair representation was developed by this Court as a concomitant to a Union's right to exclusive representation of persons that it has been certified to represent: *Steele v. Louisville and Nashville R. R.*, 323 U. S. 192 (1944). Once certified, minority groups within the Union are unable to represent themselves: *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180 (1967). Since they are unable to look out for their own interests except through the intervening strata of Union leadership, this Court has imposed upon that leadership a fiduciary responsibility to represent the entire unit as a class, and has declared illegal those actions by Union leaders which arbitrarily sacrifice the interests of a minority to benefit the majority: *Steele v. Louisville & Nashville R. R., supra,* at 199-200; *Conley v. Gibson,* 355 U. S. 41 (1957). While it is of course impossible for Union leaders to satisfy everyone it represents, the Union must nonetheless act with honesty and "complete loyalty to . . . all it represents", *Ford Motor Co. v. Huffman,* 345 U. S. 330, 337-38 (1953). To satisfy this duty, a Union must act "without hostility or discrimination toward any, [must] exercise its discretion with complete good faith and honesty, and [must] avoid arbitrary conduct": *Vaca v. Sipes,* 386 U. S. 171, 177 (1967).

Thus, it is no answer to an unfair representation case to say, as the Court of Appeals has in effect said, that actions satisfactory to a majority of employees satisfy the duty of fair representation, especially when, as here, the majority of employees have been the beneficiary of the Union leaders' past conduct, and has actively and hostilely

opposed the minority's quest for equality. Simply stated, a minority has no "right" to fair representation if its complaints about discrimination can be legally rejected by the devise of putting the complaints up to a majority vote through the ratification process. Union leaders would be able to insulate themselves from liability by defaulting in their leadership obligations, and simply tossing the ball of contention into the arena of the vote. This is a particularly harsh result when the normal ratification process involves many issues; an employee who favors rectification of discrimination against a minority group may nonetheless vote against that claim if the proposed rejection is coupled with a substantial wage increase. We submit, therefore, that this Court should not let stand the concept that a minority's legal right to fair representation can be extinguished in the voting booth.

Closely related to the foregoing issue is the question of whether a Union may hide its conduct behind lies and misrepresentations, and yet escape liability. In this case, the lies extended from the very first contract in 1964 until after the last in 1970. The IAM leaders misrepresented to their trusting KSC members the derivation of the restricted seniority, their own efforts to remove it, and TWA's position concerning it.

There is no reason in the adversary world of labor-management relations for Union members to doubt that their own leaders are telling them the truth. Thus, as in this case, circumstances of wrongdoing can be covered up over long periods of time, and the cumulative effect is to create a status quo which can be difficult to change. To impose upon employees who have been the victims of discrimination the burden of proving what they would have done six years before had they only known the truth, is, in effect, to defeat their case *ab initio* and relegate them to

the status of permanent discriminatees, as has occurred here.

We can only speculate what the KSC employees might have done had they known that it was their national union which was responsible for the seniority restriction. They might, for example, have challenged TWA's voluntary recognition of the Union to represent them, under *Pan American World Airways v. United Brotherhood of Carpenters*, 324 F. 2d 217 (9th Cir. 1963) *cert. den'd* 376 U. S. 964 (1964); they might have sought protective provisions, including successorship clauses, or special provisions on severance pay; they might have waged more effective political warfare within the Union.

Any number of ideas can be conjured up; but the point is that it is an impossible burden to show what might have occurred when one has been lied to for so long that the employees comprising the majority have come to rely upon the status quo created thereby as natural conditions of their employment. The effect of the lies in this case was, therefore, to shape and create the political dispute which caused the union leadership to respond by rejecting TWA's thrice-made proposal for equal seniority. The lies cannot be divorced from the question of submitting minority rights to a vote. We submit that this Court cannot let stand a holding that a Union satisfies its fiduciary obligation to its members when it lies to them, and affirmatively misrepresents matters which go to such important questions of job security as seniority.

As this Court held in *Steele, supra,* variations in contracts as they apply to union members must be based upon differences "relevant to the authorized purposes of the contract in conditions to which they are to be applied . . . ." 323 U. S. at 203. The decision in this case that the underlying seniority agreements did not amount to a

breach of the IAM's duty of fair representation substantially erodes that principle.

There was no difference in skill involved in the jobs at KSC and elsewhere; the IAM and TWA agreed to that in the course of their 1970 negotiations (316a-18a, 751a). Transferees to KSC accrued system seniority as they worked there, while persons hired at KSC who did identical work did not (see, *e.g.* 392a-94a). The only difference between those who accrued system seniority and those who did not was that the latter were hired in Florida and the former were not. The purpose of this dichotomy was to protect the Union's members at already-existing locations when the KSC operation began (167a-68a, 1535a). If place of hiring is a "relevant difference" within the meaning of *Steele,* virtually any discrimination in seniority can be justified.

The holding of the Court of Appeals thus stands for the propositions that a Union may propose and bring about arbitrary contract discriminations which protect one group of members at the expense of others, hide its conduct behind lies and misrepresentations, and submit the discriminatory provisions to a vote of the membership (a majority of whom favor the discrimination), thereby avoiding liability for breaching the minority's rights to fair representation. We submit that the holding undercuts this Court's holdings respecting Unions' duties, and permits abuses of the exclusive representation provisions of the federal labor laws.[4]

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4. We have not discussed TWA's liability for executing and enforcing the contracts. That liability is reached only upon a determination that the Union breached its duty in respect to the agreements themselves. We propose to argue issues related to TWA's liability if certiorari is granted. In connection with TWA's liability, see *Jones v. Trans World Airlines, Inc.*, 495 F. 2d 790 (2d Cir. 1974).

2. The Decision Conflicts With the Second Circuit's Decision in Jones v. Trans World Airlines, Inc.

The Second Circuit's decision in *Jones v. Trans World Airlines, Inc.*, 495 F. 2d 790 (2d Cir. 1974), conflicts with the decision in this case in principle, if not directly. The *Jones* case involves the same defendants as in this case, and also involves the 1970 collective bargaining agreement.

In *Jones*, TWA had acceded to the Union's demand that the Union be recognized as bargaining agent for a group of employees it had not previously represented. In subsequent negotiations, TWA and the IAM agreed that the members of this group should not be given seniority credit for the time they had worked for TWA, but should be treated as newly-hired as of the date that the contract was to be executed. Thus, they were placed behind all other IAM members and treated as newly hired in January, 1970--just as were the Petitioners in this case. Indeed, they had the same seniority date as do the Petitioners.

The Second Circuit held that the IAM's conduct violated its duty of fair representation, and held both the IAM and TWA liable for reconstituted seniority and damages.

The Third Circuit considered *Jones* distinguishable on the ground that, in *Jones*, the Union had discriminated against the Plaintiffs on the basis of their prior non-membership in the Union.

We respectfully find the *Jones* case indistinguishable from this case. The Plaintiffs in the *Jones* case were in precisely the same position in 1970 as were the Petitioners in this case in 1964. Neither group had previously consisted of Union members; and both groups were singled out for disparate treatment which favored pre-existing Union members. The Court in *Jones* based its decision on the premise that when the Union undertook to represent

the Plaintiffs in that case, they were *de facto* members and therefore could not be discriminated against: 495 F. 2d at 797. We submit that the same rationale applies to the Petitioners.

Of course, the *Jones* plaintiffs were immediately tailended on the system seniority roster, while the Petitioners in this case were initially denied system seniority altogether. We submit that there is no basis for a distinction in that. When the present Petitioners were finally given limited system seniority, they were treated exactly the same as were the Plaintiffs in *Jones*. In effect, the *Jones* negotiation between IAM and TWA was a telescoped version of the KSC negotiations between IAM and TWA: previous non-members ended up with tailended seniority irrespective of their skills or prior company service. To find a distinction between the two groups is to say that dues-paying, lied-to Union members are in a worse position vis-a-vis their Union than are non-members.

We submit that the decision in this case, and the decision in the *Jones* case, are irreconcilable and that the conflict, unless resolved, will lead to confusion among Union leaders, Union members and the Courts as to the duties of Union leaders.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and conclusion of the Third Circuit.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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CIVIL ACTION No. 71-2945

—

CHARLES DEBOLES, et al.

v.

TRANS WORLD AIRLINES, INC.
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INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 142, IAMAW, AFL-CIO; LOCAL LODGE 1776, IAMAW, AFL-CIO

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MEMORANDUM OPINION AND ORDER.

VANARTSDALEN, *J.* October 31, 1975

Plaintiff, Charles Deboles, has brought a class action on behalf of active and furloughed employees of Trans World Airlines, Inc. (TWA) who were originally employed by TWA at the Kennedy Space Center (KSC) and worked in job classifications represented by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM).[1] The defendants are the employer, TWA, and the union, IAM.[2] The gravamen of the com-

1. By order dated March 29, 1973, pursuant to Fed. R. Civ. P. 23, a class action as a Rule 23(b)(2) class was certified.

2. Additional defendants are the subordinate body of the union representing workers of TWA, District Lodge 142, and the local body of the union representing TWA employees in Philadelphia, Local Lodge 1776.

plaint is that the union violated its duty of fair representation owed to the plaintiffs by denying to them the same seniority rights that all other IAM represented TWA employees enjoyed. TWA's liability is premised on its participation in the creation and enforcement of the contracts which contained the seniority provisions.

The evidence establishes that the union defendants actively deceived the KSC employees with regard to union efforts to secure systemwide seniority benefits, and, in so doing, the union breached its fiduciary duty of fair and honest representation. Therefore, on the issue of liability, judgment will be entered in favor of the plaintiff class against the defendant union and its subordinate defendant units.

Findings of Fact.

1. Plaintiff, Charles Deboles, is a resident of Media, Pennsylvania. He was first employed by defendant, Trans World Airlines, Inc. (TWA) at Kennedy Space Center (KSC), Merritt Island, Florida on May 18, 1967 as a medical technician, a non-bargaining unit position. On February 28, 1968 he became a stores clerk which was a job classification represented by International Association of Machinists and Aerospace Workers, AFL-CIO (IAM). Since that time he has continued to be a member of the IAM and an employee of TWA although he has been on furlough status since January 14, 1974 (N. T. 17-17a).

2. Defendant, Trans World Airlines, Inc., is a Delaware corporation authorized to do business in Pennsylvania and which has an office at the Philadelphia International Airport in Philadelphia, Pennsylvania (N. T. 16).

3. Defendant, International Association of Machinists and Aerospace Workers, AFL-CIO, is an unincorporated labor organization consisting of a Grand Lodge and various District and Local Lodges throughout the United States and Canada. It has duly authorized officers and agents engaged in representing employee members in Pennsylvania (N. T. 17).

4. At all times material hereto, the IAM has been certified as the exclusive bargaining representative of persons employed by TWA in the job classifications denominated "Mechanics and Related Employees" by the National Mediation Board under the Railway Labor Act, 45 U. S. C. § 151 *et seq.* (1970) (N. T. 675).

5. Defendant, District Lodge 142, IAMAW, AFL-CIO (District Lodge 142), is a delegate body of the IAM representing bargaining unit persons employed by TWA throughout the country (N. T. 664).

6. Defendant, Local Lodge 1776, IAMAW, AFL-CIO (Local 1776), is the Local Lodge which represents TWA employees at Philadelphia International Airport. It has an office at 520 Main Street, Darby, Pennsylvania. Plaintiff Deboles is a member of Local 1776 and has been since his transfer to Philadelphia on May 1, 1971 (N. T. 16-17, 306).

7. All defendants have been parties with each other to collective bargaining agreements covering IAM members employed by TWA at KSC and elsewhere since 1964 (N. T. 18).

8. In 1963, TWA submitted an ultimately successful bid to the National Aeronautic and Space Administration (NASA) for the base support contract at KSC. (At that time called the Merritt Island Launch Area—MILA) (N. T. 40, 63).

9. Prior to beginning operations at KSC, TWA approached the IAM to indicate that it would be willing to

recognize the IAM as bargaining representative at KSC (N. T. 39-42). TWA was concerned with maintaining a stable work force at KSC and (a) it believed that it could secure greater labor stability under the Railway Labor Act as compared with the National Labor Relations Act (39-42, 181-82); (b) TWA had a stable relationship with the IAM and hoped to avoid jurisdictional disputes (N. T. 41-42).

10. In January 1964, after ratification of the main collective bargaining agreement for TWA employees, TWA and the IAM negotiated a supplemental agreement to cover KSC employees. The main collective bargaining agreement applied at KSC except as varied by the MILA Supplement (P-3, N. T. 38, 43).

11. "System Seniority" is nationwide job classification seniority under which TWA employees are ranked on national system seniority rosters based upon their length of service in that classification, regardless of the TWA location at which they work. System seniority gives an employee the right to bid for vacancies at other locations from the locations where they were then working, the right to bump, or displace, employees with junior classification seniority at other locations in the event of a furlough, and preferential rights to shift assignments and days off at the particular location where an employee is employed (N. T. 32-34, 164-65).

12. Since at least 1960, all TWA employees represented by IAM accrued system seniority from the date they entered their respective classifications, except employees hired by TWA at KSC (N. T. 34-35, 165).

13. The 1964 MILA Supplement provided that new employees hired at KSC would not be listed on the system seniority roster and would not be permitted bid or displacement rights to other system locations. It also provided that system employees could bid for jobs at KSC only on a "consideration basis," that is, without the right to a job on the basis of seniority. System transferees could not use their system seniority for any purpose at KSC but had KSC seniority from the date of transfer. However, the system seniority continued to accrue for transferees to KSC (P-3), but they had to remain at KSC for one year before they were eligible to bid out (P-3, N. T. 143-46).

14. TWA wanted to limit transfers from the TWA system to KSC to prevent wholesale and seasonal "snowbird" [3] transfers from another station, to be able to ensure that the skills would be usable at KSC and to minimize disruption at KSC which would be caused by displacement of KSC employees (N. T. 138-142, 152-53).

15. TWA needed a stable work force at KSC because of the vital importance of KSC to the national space program (N. T. 42-44).

16. At the time that the MILA Supplement was concluded on February 17, 1964 (N. T. 112), there were no TWA employees working at KSC (N. T. 65).

17. TWA began to supply base support services at KSC on April 1, 1964.

18. There were approximately 2000 TWA employees at KSC of which approximately 70% (1400) were in IAM represented classifications. During the period in which TWA operated the KSC between 60 and 90 employees transferred to KSC (N. T. 135).

19. The rapid increase in the size of the work force at KSC provided promotional opportunities more rapidly

3. "Snowbird" refers to a person with high seniority who transfers to Florida for the winter (N. T. 143).

than on the TWA system generally (N. T. 279-80, 475-77).

20. KSC employees who were junior in seniority to system employees were protected from being laid off or "bumped" when layoffs occurred at other stations on the TWA system (N. T. 279-280).

21. When union members at KSC complained about their lack of system seniority, Mr. Miller, General Chairman of District Lodge 142, advised them that NASA wanted a stable work force but that seniority rights for KSC employees could be changed in the 1966 contract (N. T. 482-83, 1136).

22. Prior to the 1966 collective bargaining agreement, the employees at Local 773 (KSC) submitted a proposal to Carl Gordon, Assistant General Chairman of District Lodge 142 to eliminate the system seniority restrictions for KSC employees from the supplemental agreement (N. T. 392-94).

23. When the negotiations opened in 1965, no proposal was made in the opening documents by either TWA or the IAM with regard to changing the seniority at KSC (N. T. 393).

24. In July 1966, all TWA employees went out on strike (N. T. 396).

25. Union officials were concerned that the strike and particularly its effect on the space program at KSC might prompt Congress to pass binding arbitration legislation. Local 773 negotiators were urged by W. J. Usery of the IAM Grand Lodge and Gordon of District Lodge 142 to settle on a tentative agreement for KSC employees and return to work. A tentative agreement was reached only as to KSC which did not grant system seniority to KSC

employees. This agreement was ratified and workers at KSC returned to work a month earlier than TWA system employees (N. T. 396-403).

26. The 1966 Supplemental Agreement (pp. 98 to 101 of P-8) did make minor changes in seniority applicable at KSC. Under paragraph 5, employees newly hired at KSC after one year could bid for vacancies on the system on a preference bid basis, namely, that the bid was not of right but KSC employees would be preferred over new hires at the system location. TWA system employees who had transferred to KSC, been promoted in classification or attained a lead position, and then transferred back to the TWA system, could bid back into the system only at the level at which they had left the system to go to KSC (N. T. 86, 122-124, 198-200).

27. Gordon was questioned as to what had happened and he advised Local 773 that the union had done the best it could, but that TWA had attached unacceptable strings to the proposal, including an additional no-strike clause, unlimited shifts, and additional work rule changes (N. T. 403). However, W. E. Malarkey, who was the principal negotiator for TWA in the national negotiation (N. T. 166), testified that he did not recall any "deep discussions at any point in that round about seniority at MILA." (N. T. 193).

28. A proposal submitted by Local Lodge 773 to incorporate KSC into the TWA system for seniority purposes was submitted at the 1967 District Lodge 142 convention and was approved by the convention (N. T. 409-410).

29. On November 1, 1968 negotiations leading to the 1970 agreement opened with an exchange of proposals. A proposal submitted by District Lodge 142 as item 2 was

to grant retroactive system seniority to KSC employees (P-9). TWA's 27th proposal also would have granted retroactive system seniority to KSC employees (P-7a).

30. In the course of the negotiations, TWA expressed a concern over the transferability of job classifications from KSC to the TWA system because of the substantial difference between the type of work conducted at KSC from that at other TWA locations. An agreement was reached by which job classifications at KSC were matched with job classifications elsewhere on the system (N. T. 275-277).

31. Discussions of KSC issues were infrequent in the early phase of negotiations until May 1969 (N. T. 216, 222-226).

32. In May, 1969, District Lodge 142 held its annual convention in Las Vegas, Nevada, and Carl Gordon reported that the KSC seniority issue was "very close to settlement" but that "[a]ny full report at this time might vary from the final draft." (N. T. 624).

33. In late June or early July 1969, TWA submitted a proposal to John Schwind of District Lodge 142 which would have given retroactive system seniority to KSC. The proposal bears the typed name of Wm. J. Malarkey of TWA at the end. Handwritten markings were made upon the document by Carl Gordon (N. T. 785-90).

34. Jack Barker, Vice President of District Lodge 142, and James Fowler, Assistant General Chairman of District Lodge 142, reported to the membership of Local 773 at KSC that retroactive system seniority had been agreed to (N. T. 417-18, 526-27, 532, 741, 837-38, 1092-94).

35. On October 15, 1969, TWA submitted a document to the union identical to that submitted in June or July (N. T. 252-53).

36. In September and October, 1969, petitions were generated by IAM members of Local Lodge 1650 in Kansas City and circulated throughout the TWA system opposing retroactive system seniority for KSC employees (N. T. 633, 976-77, 1058). This was caused primarily by the fear of system employees that they would be subject to being bumped by KSC employees (N. T. 1058-59). Local Lodge 1650 made up approximately forty (40) percent of all IAM members represented by District Lodge 142 and had the single largest membership of any local lodge of TWA workers (N. T. 611-12). Kansas City was the repair and maintenance center for all TWA aircraft (N. T. 612).

37. Quentin Kerr, a member of the District Lodge 142 negotiating team was sent to Kansas City and New York to investigate the opposition to KSC system seniority. Kerr did not try to persuade the employees at those locations to drop their opposition (N. T. 632-34).

38. Quentin Kerr believed that it was fair to grant only future system seniority to KSC employees because he believed it would be impossible to apply retroactively and would be unfair to system employees (N. T. 643-47).

39. In late November 1969, the negotiating committee of District Lodge 142 voted to remove the proposal for retroactive system seniority for KSC from the negotiating table because the committee decided that a contract with such a provision might not be ratified (N. T. 642-43, 976-78, 992-96). Officers and members of Local 773 and KSC employees were not then advised of this (N. T. 1096-97).

40. The officers of Local 773 learned about the petitions opposing granting KSC systemwide seniority rights during November, 1969. In December, 1969, Local 773 began to send letters and telegrams to union officials urging support for retroactive system seniority for KSC employees (N. T. 419-24, P-51 to P-58).

41. Retroactive seniority was kept on the table as a union proposal until the last day or so of negotiations (N. T. 1177, 1188).

42. After the negotiating committee decision, Local 773 President, D'Andrea, was advised by union officials that there were serious problems with the seniority proposal because TWA was attaching strings such as a no-strike agreement to it (N. T. 840-42).

43. William Blanchard, labor relations Representative for TWA at KSC, advised D'Andrea and Reilly, Chairman of the Grievance Committee, that TWA did not oppose retroactive system seniority for KSC employees (N. T. 426-29).

44. During the final days of negotiation, a proposal developed by James Fowler, Assistant General Chairman of District Lodge 142, was agreed to by the parties. It provided that KSC employees would begin to accrue system seniority as of the date of contract ratification, and system employees would begin to accrue KSC seniority on the same date (N. T. 986-87).

45. Final agreement was reached between defendant unions and TWA on January 16, 1970. KSC employees were notified of the contract terms by a union bulletin shortly thereafter as were all TWA employees (TWA-1. N. T. 429-30). The contract required ratification by a majority of the entire IAM union membership employed by TWA (N. T. 1125).

46. The 1970 contract was advantageous from the union standpoint. It provided for a revamped grievance and arbitration procedure, beneficial pension and wage improvements and established a new job classification (N. T. 271-72, 641-43, 666-67).

47. The 1970 contract provided that all TWA employees initially hired at KSC would begin to accrue system seniority as of the date of the contract, January 28, 1970.

48. James Fowler, Assistant Chairman of District Lodge 142, went to KSC to conduct a ratification meeting. First he met with the executive board of Local 773 and advised them that the union had done everything within its power to obtain retroactive system seniority but that TWA had attached unacceptable conditions to the proposal and that system seniority for KSC workers effective as of the signing of the agreement was the best that could be done (N. T. 430-32, 848-49, 920-23).

49. The primary reason that the union officials did not obtain retroactive system seniority for KSC employees was the fear and the risk that the contract would not be ratified because of opposition by TWA workers at other system locations.

50. At the ratification meetings, Fowler repeated his statements that the union had done everything it could to secure retroactive system seniority, but that TWA had attached unacceptable conditions to it (N. T. 433-35, 708-10, 850-51).

51. The executive committee of Local 773 did not take an official position on the contract and no member of the executive committee spoke in support of or in opposition to ratification at ratification meetings held at KSC (N. T. 1069).

52. The employees at KSC voted 714-69 to ratify the contract (D-4).

53. After the voting had been concluded at each of the two ratification meetings, Reilly of Local 773 stated to the members that he had suspicions that either TWA or the union was lying and urged legal action to determine the truth (N. T. 729-732).

54. In mid-1970, Carl Gordon sent a copy of the Company's offer of retroactive system seniority (P-20) to Harold Martin, a member of Local Lodge 773 (N. T. 815-16). Martin showed the document to Reilly and D'Andrea (N. T. 437-39, 852-53). These men considered this letter to be the first concrete proof they had that the Company had in fact been willing to agree to retroactive system seniority (N. T. 437-39, 852-53). However, they were concerned because the document contained no signatures (N. T. 438, 853).

55. In order to find out whether in fact the Company's proposal had been agreed to, as had been reported to Local 773 by Barker and Fowler during the summer and fall of 1969 (finding of fact 34), these men decided to take the letter to the District Lodge convention in October 1970, and bluff the Union leaders into believing that they had a copy of a document which contained a signature, in order to see if they could get an admission that in fact the document had been signed (N. T. 440, 561, 853, 950-51).

56. On October 30, 1970, at the convention, John Schwind, President of District Lodge 142, was confronted with the document and he twice admitted that he had signed the document though in fact he had not (N. T. 296-300).

57. A motion made on the floor of the October convention of District Lodge 142 to renegotiate for retroactive system seniority at KSC was defeated (N. T. 321).

58. Shortly thereafter, TWA lost its contract with NASA and ceased its operations at KSC on April 1, 1971 (N. T. 454-55).

59. In May, 1970, plaintiff Deboles voluntarily transferred to Los Angeles and began to work there in the same job classification as a stores clerk on June 10, 1970 (N. T. 300-01).

60. Deboles was laid off at Los Angeles and displaced into Philadelphia in May 1971 (N. T. 350).

61. Deboles worked at Philadelphia as a stores clerk until September, 1971 when he was again laid off (N. T. 306).

62. Deboles then filed a grievance because an employee who had entered the classification of stores clerk later than February 28, 1968—Deboles' KSC stores clerk seniority date—continued to work. That grievance was denied by the Company because Deboles' system seniority date, based on the terms of the 1970 collective bargaining agreement was January 28, 1970 (the same as all other former KSC employees with transferable job classifications), and the other employee involved had an earlier stores clerk date (N. T. 307-08).

63. Deboles' request to Local 773 to process the second step of the grievance procedure was denied (N. T. 309-10).

64. Deboles was laid off in September, 1971, recalled to work in July, 1972 and laid off again in January, 1974. As of the date of trial, he remained on furlough status (N. T. 316).

Conclusions of Law.

1. This court has jurisdiction over the subject matter of this action. 45 U. S. C. § 152 (Fourth) and (Eleventh) (1970); 28 U. S. C. § 1337 (1970).

2. This court has personal jurisdiction over each of the defendants. Fed. R. Civ. P. 4(d)(3); Fed. R. Civ. P. 4(d)(7).

3. Venue is properly situated in the Eastern District of Pennsylvania. 28 U. S. C. 1391 (1970).

4. The duty of fair representation arises under the Railway Labor Act, 45 U. S. C. § 151 *et seq.* (1970), made applicable to air carriers by 45 U. S. C. § 181 (1970).

5. The defendant unions breached their fiduciary duty of fair representation owed to plaintiff and members of the class in failing to make full and honest disclosure of the union efforts (and lack of efforts) regarding KSC system seniority from 1965 through 1970 and the reasons therefor.

6. The defendant unions are liable to plaintiff and the class.

7. TWA is not liable to plaintiff and the members of the class because there is no evidence of TWA's participation in the misleading and incomplete communications from the IAM to the KSC employees which forms the basis for the unions' liability.

8. The defendants did not violate Section 2 (Fourth) and (Eleventh) of the Railway Labor Act by requiring KSC employees to join the union as a condition of employment because seniority is not a condition of union membership.

9. This action is not barred by the statute of limitations because suit was filed less than two years after the unions' breach of duty and the applicable statute of limitations is six years. *See Gainey v. Brotherhood of Railway & Steamship Clerks*, 275 F. Supp. 292 (E. D. Pa. 1967), *aff'd* 406 F. 2d 744 (3d Cir. 1968), *cert. denied*, 394 U. S. 998 (1969).

Discussion.

The broad outline of a union's duty of fair representation has been set forth by the Supreme Court in several leading cases. The seminal case in this area is *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), which held that the union could not discriminate in its contracts against minority nonmembers who were excluded from membership because of race. The Railway Labor Act, 45 U. S. C. § 151 *et seq.*, was read to impose on the bargaining representative a duty to exercise its power fairly on behalf of all for whom it acts without hostile discrimination. The duty springs from the role of a union as the *exclusive* representative of a craft. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953), upheld collective bargaining agreements which gave employees seniority credit for pre-employment military service. Thus, workers with post-employment military service were surpassed in seniority by some whose actual employment dates were later. The Court stated:

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 345 U. S. at 338.

Humphrey v. Moore, 375 U. S. 335 (1964) sustained the validity of dovetailing seniority lists. An allegation of

dishonesty and deceitful conduct was sufficient to constitute a charge of breach of the union's duty of fair representation though, in the final analysis, the evidence did not prove the charge. Thus, in both *Huffman* and *Humphrey*, the Court found that more favorable seniority for some employees was based upon relevant and reasonable considerations.

The union's enforcement of its grievance procedure was alleged to be arbitrary in *Vaca v. Sipes*, 386 U. S. 171 (1967). The Court, finding no evidence of hostility or bad faith, stated: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U. S. at 190. It must be determined, then, whether the conduct of the union falls into one or more of these distinct categories. The evidence in the instant case supports the conclusion that while the decision to set up a separate seniority list at KSC was not a wholly arbitrary one and the different treatment of KSC employees was not impermissibly discriminatory on its face, the IAM did not act with honesty and complete good faith and therefore it violated its duty of fair representation.

The Fourth Circuit has set forth three questions as the test of discrimination and bad faith.

> Did the plaintiff show that he received different or substantially sub-standard representation at the hands of the Brotherhood? If so, was it because of some improper reason . . .? Did this treatment cause him injury?

Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191, 200 (4th Cir. 1963). There is no doubt that KSC employees were treated differently with regard to

seniority rights than other IAM represented TWA employees. Thus, the focus of the inquiry is on the considerations prompting such different seniority status. An improper reason would be one that is arbitrary, discriminatory or in bad faith, as prohibited by *Vaca v. Sipes, supra.*

The plaintiff has argued that the decision was based on improper "geographical" or "political" considerations. While a distinction based solely on geographic location might be arbitrary, it is necessary to inquire into the factors underlying what is, in result, a geographic distinction. TWA wanted the KSC workers to be isolated from the system because many of the job skills at KSC were unique to that operation. This was a legitimate consideration which is supported by the fact that system transferees to KSC were placed at the bottom of the KSC seniority list.

It is true that distinctions must not be made on the basis of relative political strength within the union. *Sanders v. Air Line Pilots Ass'n. Int'l.*, 473 F. 2d 244 (2d Cir. 1972). But proving an improper political motivation is difficult. In the instant case, it is undisputed that the union officials received petitions from Kansas City employees protesting any grant of retroactive system seniority to KSC workers. Each side in this lawsuit uses this fact as support for its respective contention. Plaintiff urges that the petitions served as a reminder of the political clout of the system employees. The union officials would be up for re-election the following year. The union defendants maintain that the effect of the petitions was to create in the union officials the good faith belief that an agreement providing for retroactive system seniority for KSC workers would not be ratified by a majority of the membership. It is well settled that the mere fact that there is a detriment to one group does not establish a breach of duty.

> [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in tak-

> ing a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.

Humphrey v. Moore, 375 U. S. 335, 349 (1964). Similarly, the Sixth Circuit stated:

> [T]he mere fact that the integration of a seniority list is detrimental to one group of employees, and favorable to another, does not establish that the union has reached [sic] its duty of fair representation if it has integrated the list in good faith and not on grounds totally irrelevant to seniority.

Kesinger v. Universal Airlines Inc., 474 F. 2d 1127, 1130-31 (6th Cir. 1973).

The Third Circuit considered whether the duty of fair representation had been breached in *Price v. International Brotherhood of Teamsters*, 457 F. 2d 605 (3d Cir. 1972). In that case, the decision of a grievance committee to dovetail employees from a closed operation into an ongoing operation rather than put them at the bottom of the seniority list was held to be within the authority of the committee. The court stated that the union must give both sides "an opportunity to make their case and then decide the question honestly and impartially. . . ." *Id.* at 611. The evidence discloses in the instant case that both KSC employees and system employees presented their views to the negotiators from District Lodge 142 and that those negotiators gave some consideration to the respective positions. But to ask whether the decision was made "honestly" and "impartially" hardly advances the inquiry because the words are incapable of precise definition and the decision-making process is subjective.

The duty to represent fairly the employees in the bargaining unit is a fiduciary obligation. *Brady v. TWA, Inc.*, 401 F. 2d 87, 94 (3d Cir. 1968), *cert. denied*, 393 U. S. 1048 (1969). Such an obligation is first and foremost one of honest disclosure especially when, as here, the fiduciary is the exclusive agent of two or more groups with potentially, if not inevitably, conflicting interests. The KSC employees who did not have system seniority had an interest adverse to the system employees with 1964-1970 seniority dates. That the employees were aware of their divergent interests is evidenced by the petitions signed by TWA employees in Kansas City in the fall of 1969 opposing retroactive system seniority for those at KSC. The union was subject to conflicting pressures and inevitably some group would seem to suffer a disadvantage. In such a situation, the representative may not exercise its judgment under a pretense of vigorous advocacy of every position as it did here. The representative must be honest to all concerned. The "bad faith" of the union was its deceitful statements to the KSC employees, not in its conduct at the negotiating table.

Several circuits have held that bad faith or dishonesty is not a prerequisite to finding a breach of fair representation where the distinction complained of is arbitrary or unreasonable. *Jones v. TWA, Inc.*, 495 F. 2d 790 (2d Cir. 1974); *Griffin v. International Union*, 469 F. 2d 181 (4th Cir. 1972); *De Arroyo v. Sindicato De Trabajadores Packinghouse*, 425 F. 2d 281 (1st Cir.), *cert. denied*, 400 U. S. 877 (1970). The converse applies to the instant case. An arbitrary result is not essential to a finding of a breach of a union's fiduciary duty where as here the union officials lied to the membership concerning the status of certain proposals in the negotiations. To conclude otherwise would render meaningless the fiduciary obligation of an

exclusive bargaining agent to give full and honest disclosure of the facts to all those whom it represents no matter how unpalatable those facts might be.

The union acted in bad faith on numerous occasions. During the 1966 strike, Carl Gordon, Assistant General Chairman of District Lodge 142 and W. J. Usery of the Grand Lodge, anxious that KSC employees return to work, assured the local negotiators that the union was vigorously proposing to extend system seniority to KSC workers at the on-going national negotiations. In fact, there was little discussion of the issue during the national negotiations. The union argues that it was not required to adhere to any particular position or force any issue in the give and take of negotiations and that it must be free to exercise its judgment as to what benefits could be obtained and whether the benefit is worth the cost. That argument misses the point. In using its best judgment the union has the responsibility to fully disclose to those whom it represents what that judgment is and why. At the least, it must not intentionally deceive its members, regardless of its motives for so doing.

Quentin Kerr, District Lodge 142 negotiator, testified that during the negotiations leading to the 1970 contract, he believed that it would have been impossible to grant retroactive system seniority because of practical difficulties of administration and also because such a provision would not be ratified by the necessary majority. Yet the KSC employees were consistently told that the union was doing its best to obtain this benefit for KSC, and the reason that it was not agreed to was that TWA attached unacceptable strings to the proposal, primarily a no-strike clause. IAM officials did not tell the KSC workers the reason given at trial which was that the union did not want to jeopardize membership ratification by including a con-

troversial provision. At the ratification meeting at KSC, Fowler of District Lodge 142, blamed TWA for the failure to obtain retroactive system seniority when, in fact, TWA included such a proposal in the early negotiations and at no time strongly opposed such a provision.

Further evidence of union bad faith can be found in the conduct of Schwind, President of District Lodge 142, who, at the 1970 convention admitted signing the TWA proposal regarding KSC seniority and thus converting a proposal into a tentative agreement though he had in fact not signed it. Apparently, Schwind could not keep track of the web of deceit spun by the union. In any event, this so-called "sign-off" agreement was never disclosed at the ratification meetings.

I am convinced that the plaintiff has sustained the burden of proving that the union officials intentionally lied to the KSC employees. This is sufficient for a finding of liability without the necessity of showing that the contract would not have been ratified had there been full and honest disclosure. Even if union officials believed that a contract without retroactive system seniority for KSC was good for the union as a whole, in misleading the KSC employees regarding TWA's opposition, the union breached its fiduciary duty of honest and fair representation.

It may be noted that Local 1776, the local lodge of the IAM in Philadelphia, is a party to this case because the plaintiff Deboles has been a member of that unit since his transfer to Philadelphia. Local 1776 was not a direct participant in the events from 1964 to 1970 which gave rise to a finding of the union defendants' liability. However, since there is liability and relief may involve all local unions, it is appropriate that Local 1776 be found liable along with the IAM and District Lodge 142.

Plaintiffs' claim against TWA cannot be sustained. This is not a case where patent discrimination was incorporated into a collective bargaining agreement. *See Richardson v. Texas and New Orleans R. R.*, 242 F. 2d 230 (5th Cir. 1957). Liability of the IAM is predicated on its dishonest conduct in the context of a fiduciary relationship. There is no evidence that TWA acted collusively with the IAM to deceive the KSC employees or was in any way aware of the untruthful statements made by union representatives to KSC employees. TWA's involvement was tangential at most and it would be unfair to hold it responsible for the unknown deception of union officials. *See, Carroll v. Brotherhood of Railroad Trainmen*, 417 F. 2d 1025 (1st Cir. 1969), *cert. denied*, 397 U. S. 1039 (1970). A limitation on employer liability for union misconduct which is unknown to the employer must be imposed where the union liability is predicated on false and misleading communications to members regarding the status of an issue on the bargaining table and union efforts to obtain a benefit.

The existence of TWA's split seniority system did not violate Section 2 (Fourth) and (Eleventh) of the Railway Labor Act. Section 2 (Fourth) states that it is unlawful for a carrier to interfere with the organization of its employees or to influence or coerce them to join or remain members of any labor organization. Section 2 (Eleventh) provides that there may be a union shop and union membership may be a condition of employment, so long the membership rights will be equally available to all. But seniority, though a condition of employment, is not a condition of union membership. *See Humphrey v. Moore*, 375 U. S. 335 (1964); *Ford Motor Company v. Huffman*, 345 U. S. 330 (1953). Since the split seniority system does not violate Section 2 (Eleventh), defendants have

not lost the protection afforded by that provision and, consequently, have not violated Section 2 (Fourth) either.

This determination is limited solely to the liability of the defendant union and its subordinate bodies. The very difficult question of appropriate remedy including possible punitive damages must await further hearings. The significance of the defendants' contention that, had it insisted upon KSC employees obtaining retroactive seniority, the favorable collective bargaining agreement that had been negotiated probably would never have been ratified by the membership majority will have to be carefully considered.

To the extent that the foregoing Discussion contains statements of fact or conclusions of law not otherwise set forth in the foregoing Findings of Fact or Conclusions of Law, the same shall be deemed as Findings of Fact or Conclusions of Law.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

CIVIL ACTION No. 71-2945

—

CHARLES DEBOLES, et al.

v.

TRANS WORLD AIRLINES, INC.
and
INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO: DISTRICT LODGE 142, IAMAW, AFL-CIO: LOCAL LODGE 1776, IAMAW, AFL-CIO

———

ORDER.

AND NOW, this 31st day of October, 1975, based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, judgment on the issue of liability is entered in FAVOR of plaintiff class AGAINST the defendants, International Association of Machinists and Aerospace Workers, AFL-CIO; District Lodge 142, IAMAW, AFL-CIO; Local Lodge 1776, IAMAW, AFL-CIO. Judgment on the issue of liability is entered in FAVOR of the defendant Trans World Airlines, Inc. AGAINST the plaintiff class.

A conference on the issues of appropriate relief, including damages is hereby set for January 5, 1976 at 11:00 o'clock A. M. in Room 14614, U. S. Courthouse, Independence Mall West, Philadelphia, Pennsylvania 19106.

By THE COURT:

DONALD W. VAN ARTSDALEN, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

Nos. 76-1369 and 76-1535

—

CHARLES DEBOLES
309 Jefferson Street
Media, Pennsylvania
and
VIRGIL O. GRIFFIS
1400 Manley Road
Walnut Hills
Apt. B-3
West Chester, Pennsylvania

On behalf of themselves as individuals and on behalf of all others similarly situated,
Appellants in *No. 76-1369*

v.

TRANS WORLD AIRLINES, INC.
Philadelphia International Airport
Philadelphia, Pennsylvania
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; District Lodge 142, IAMAW, AFL-CIO; Local Lodge 1776, IAMAW, AFL-CIO
520 Main Street
Darby, Pennsylvania

Charles Deboles, Virgil O. Griffis, International Association of Machinists and Aerospace Workers, AFL-CIO, International Association of Machinists and Aerospace Workers, District Lodge 142 and IAMAW Local Lodge 1776,

Appellants in *No. 76-1535*

—

(D. C. Civil Action No. 71-2945)

—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Argued November 8, 1976

Before: ADAMS and WEIS, *Circuit Judges* and GERRY,* *District Judge*

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* John F. Gerry, United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

(Filed March 31, 1977)

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GERRY, *District Judge*

Appellant Deboles represents a class of approximately 300 members [1] of the International Association of Machinists and Aerospace Workers (hereinafter "IAM")

1. The instant class was certified by the district court pursuant to F. R. Civ. P. 23(b)(2). Counsel for appellants have informed the court that the co-plaintiff below, Virgil O. Griffis, has terminated his employment with TWA and discontinued his interest in the case.

who were originally employed by appellee Trans World Airlines ("TWA") at the Kennedy Space Center in Merritt Island, Florida, for various periods of time prior to January 28, 1970. The employees alleged below that the TWA-IAM collective bargaining agreements providing the Kennedy Space Center employees with seniority rights inferior to those enjoyed by all other employee-members elsewhere in the TWA system violated the duty of fair representation implied under the Railway Labor Act, 45 U. S. C. §§ 151 *et seq.* (1970), as applied to air carriers by 45 U. S. C. § 181 (1970). The employees also claimed that certain false statements by IAM officials regarding the IAM's failure to secure equal system seniority rights violated the union's duty of fair representation.

After a non-jury trial on the issue of liability, the District Court for the Eastern District of Pennsylvania [2] found that the seniority provisions of the collective bargaining agreements were not discriminatory and did not violate the IAM's duty of fair representation. The district court also found, however, that the defendant unions breached their fiduciary duty of fair representation in failing to make full and honest disclosure concerning both the nature of union efforts toward achievement of equal system seniority and the reasons why the union was unable to achieve such system seniority in misstatements to these employees in connection with the 1966 and 1970 collective bargaining agreements. TWA was held not to be liable for these untruthful statements of union officials, and a final judgment order was entered in favor of TWA.

In No. 76-1369, the plaintiff below appeals pursuant to 28 U. S. C. § 1291 from the final judgment in favor of TWA. The district court determined that there was no

2. *Deboles v. Trans World Airlines, Inc.*, Civil No. 71-2945 (Oct. 31, 1975) (Hon. Donald W. VanArtsdalen). The opinion and order appear at App. 1384a-1406a.

just reason for delay and properly entered judgment under F. R. Civ. P. 54(b), inasmuch as a single appeal from that judgment reasonably could be expected to decide the issue of TWA's liability without delaying appellate review until after the conclusion of bifurcated proceedings, not involving TWA, on the amount of damages.

In No. 76-1535, the plaintiff's class of employees and defendant unions appeal by permission of this court under 28 U. S. C. § 1292(b) from the interlocutory order determining liability in favor of the plaintiffs below and against the unions. The employees urge that the district court erred in not also finding that the collective bargaining agreement unfairly discriminated against these employees, while the unions assert that it was error to hold the unions liable for false statements in the absence of prejudicial effect upon the ultimate outcome of the ratification ballot.

We affirm the district court's finding that the seniority differences do not violate the duty of fair representation,[3] and we reverse the finding that the union is liable for false statements to these employees under the facts of this case.[4] We also affirm the finding of no liability with respect to TWA.

I.

In February 1964, TWA entered into a contract with the National Aeronautics and Space Administration (NASA) to provide base support services at the Kennedy Space Center in Merritt Island, Florida. At the time, TWA had a collective bargaining agreement with the IAM [5] covering many employees throughout the TWA sys-

3. *See* part III, *infra.*

4. *See* part IV, *infra.*

5. The IAM Grand Lodge or International is the certified bargaining representative of the relevant bargaining unit of TWA employees in this case. The International was named as defendant

tem in the aircraft industry. In early 1964, after ratification of the main collective bargaining agreement for TWA employees but before TWA's operations commenced at the Space Center, TWA and the IAM entered into a supplemental agreement applicable only to the TWA employees at the Kennedy Space Center. These employees were subject to the same series of collective bargaining agreements in 1964, 1966 and 1970, applicable to other IAM members throughout the TWA system, except as modified by supplemental agreements.

In the job classifications relevant to this action, the TWA-IAM agreement generally applied to personnel maintaining and servicing aircraft in TWA's facilities at major American airports and at the central maintenance base in Kansas City. The Kennedy Space Center employees of TWA were a small minority of the employees in TWA's national "system."

Throughout the rest of the TWA system, employees represented by IAM accrued "system seniority" since at least 1960. Generally, system seniority recognizes seniority rights which accrue from the date of entering a job classification on a regular assignment. Employees in a given job classification are ranked on a national system seniority roster based upon their length of time in the classification, regardless of the TWA location at which they work. An employee with greater system seniority who faces furlough (layoff) may displace an employee with lesser seniority

5. (Cont'd.)

below along with IAM District Lodge 142 (the subordinate national body of the International, representing TWA and Ozark Airlines employees). The Local Lodges represent employees at each operation in each city; defendant Local 1776 in Philadelphia represents TWA employees at the station from which appellant Deboles was laid off; Local 773 was the Kennedy Space Center Lodge. Unless otherwise indicated, "IAM" will hereinafter refer to the International and the District Lodge collectively.

in the same job classification anywhere in the TWA system. An employee with greater seniority has the right to a "preference bid" for transfer to other jobs in the same classification where vacancies exist.

The group of TWA employees at Kennedy Space Center were treated differently. Under the TWA-IAM supplemental agreement of 1964 (as extended in 1966), these employees did not enjoy the benefit of system seniority. The appellants accordingly did not accrue system seniority credit for their period of employment at the Space Center prior to January 28, 1970, at which time a new collective bargaining agreement was reached between IAM and TWA. The 1970 agreement provided that the Space Center employees would enjoy system seniority but on a nonretroactive basis. Appellants assert that the disregarding of their pre-1970 period of employment at the Space Center resulted in a situation whereby other system employees with less time in the company but greater system seniority received preference in the bidding for available positions throughout the TWA system.[6] The appellant employees allege that the denial of system seniority was designed to protect employees hired at other locations from the exercise of seniority rights by the Space Center employees.

The appellants were themselves protected, however, by provisions of the supplemental agreement which pre-

6. The disadvantage of lack of pre-1970 system seniority is illustrated by the work history of appellant Deboles. He had been hired at the Space Center in February, 1968, but under the 1970 contract he accrued seniority only for periods of work *after* January, 1970. He voluntarily transferred to the TWA station in Los Angeles in May, 1970, and worked as a stores clerk there for a year. He was displaced to the Philadelphia station and worked for several months until he was laid off. His position was held by an employee who entered the stores clerk classification later than February, 1968, but before Deboles' seniority date of January, 1970. Deboles continues in furlough status.

vented senior system employees from "bumping" Space Center employees. A newly-hired Space Center employee was thus free from concern for losing his or her job to a non-Space Center person with greater seniority. A person who transferred to the Space Center from elsewhere in the TWA system was placed at the bottom of the Space Center seniority list, although system seniority credit accrued to such an employee in the event of his transfer back to the system.[7] To further discourage transfers to the Space Center, the supplemental agreement required any system employee who was accepted at the Space Center to remain for at least one year prior to bidding back into the system.

During the growth of the national space effort in the 1960's, promotions occurred significantly more rapidly for Space Center employees than for their counterparts elsewhere in the TWA system.[8] The employees already at the Space Center filled the promotion slots, since they were protected from "bidding in" by others elsewhere in the

7. The 1966 modification of the supplemental agreement made changes favorable to the appellant-employees. Workers hired originally at the Space Center could bid for vacancies on the system after one year on a "preference" basis, that is, without displacement rights but with preference over new hires at a system station. A worker transferring to the Space Center, on the other hand, could not enjoy re-transfer privileges back to the system in any job classification to which he or she had been promoted while at Space Center.

8. After TWA operations at the Space Center commenced on April 1, 1964, employment grew from 300 to about 2,000, of which 70% were represented by the IAM. During the nearly 7 years of TWA operations, only 60 to 90 employees transferred from the system to the Space Center. Higher classifications and lead position slots abounded at the Space Center, where employees reached positions customarily in a few months which would have taken years to achieve in the system. For example, in the regular system it took about 8 years for an employee to advance from stores clerk to the position of mechanic, while from 1964-1970, Space Center stores clerks made the same jump in an average of 7 months.

system; layoffs were rare at the Space Center, in contrast to the regular TWA stations.[9]

The district court found that in 1964 TWA opposed transfers to and from the Space Center because of its concern for a stable work force in the space program. TWA was found to be concerned about "snowbird" transfers (*i.e.*, system employees who would use higher seniority rights to transfer to the Space Center in Florida in the winter and return to their regular post in the TWA system in the summers). The meshing of skills between the space-oriented employees in Florida and the TWA aircraft workers elsewhere was also a concern. The problems of "snowbirds" and meshing of skills were thus minimized, and a more stable work force was made possible by erecting a seniority barrier between Space Center employees and those in the TWA system.

The appellants urge that the reason for the different treatment for the Space Center was not TWA's desire for a stable work force, as the court below found, but was instead IAM's desire to protect its own members elsewhere in the system from the risk of being bumped from their positions in the event of termination of TWA's contract with NASA at the Space Center. Some support for this assertion is found in the direct testimony of TWA's Calvin Filson, negotiator of the 1964 supplemental agreement, and also in a 1964 letter by TWA's J. J. Manning, manager of labor relations at the Space Center.[10] The denial

9. Seasonal layoffs were customary in the TWA system, but because of protection from incoming transfers the Space Center employees enjoyed stability and growth unknown elsewhere in the system. Many employees at the Space Center worked uninterruptedly during most of the pre-1970 period, while their more senior counterparts elsewhere in the system were on layoff. The first layoff at the Space Center did not occur until August, 1969.

10. Filson's testimony (App. 167a-168a) and Manning's 1964 letter to the general chairman of District Lodge 142 (App. 1535a)

of system seniority to Space Center employees was, however, only one part of a package of special job stability

10. (Cont'd.)
indicated their belief that Section 5(b) of the 1964 supplemental agreement (restricting system seniority rights but allowing for a preference for furloughed Space Center employees over new hires at system stations) "was primarily addressed to a furlough of employees in the event of termination of TWA's [contract] with NASA." The district court apparently gave little weight to Filson's testimony in view of Filson's admittedly poor memory of the events of 1964 (*see, e.g.*, App. 168a-171a, 198a-199a, 207a-208a).

Section 5(b) of the supplemental agreement reads as follows (App. 1483a):

> New employees hired for the [Space Center] operation, who do not have seniority rights at another point, shall not be listed on the system seniority roster and shall not be permitted bid or displacement rights elsewhere on the TWA system. In the event of furlough, such employees shall, however, be permitted to file a Request for Consideration form for vacancies on the TWA system which are not filled by employees listed on the TWA-IAM system seniority roster. These requests may be filed at any time and withdrawn at any time prior to the opening of a vacancy, and shall automatically expire on January 1 and July 1 of each year. When the furloughed employee is selected for a vacancy, the Company shall notify him only at the last address filed with the Company, and he must report on the date specified, unless an extension of time is mutually agreed to. Any furloughed employee who does not file or renew a Request for Consideration, or who fails to accept a position requested, shall have his name removed from the [Space Center] operation seniority roster. An employee filling a vacancy under this provision will not receive credit for previous seniority accrual.

That Section 5(b) may have been "primarily addressed" to furlough procedures does not compel the conclusion that the overall policy of restricting employee movement to and from the Space Center was at the behest of concerned system employees. Although part of Section 5(b) restricts seniority upon transfer from the Space Center, its motivation cannot be assessed in a vacuum. Elsewhere in the supplemental agreement it is clear that TWA could refuse an application for transfer *to* the Space Center "for operational reasons" (Section 4(b), App. 1483a), unlike voluntary transfers or promotions between stations on the TWA system which were generally granted as a matter of seniority alone. (See Art. VI of main collective bargaining agreement, App. 1472a-1479a). TWA's operational concerns were thus evidenced in the supplemental contract itself, as well as in the negotiations which produced the contract (see note 11 *infra*).

provisions, described above, many of which benefited the appellants to the detriment of their system counterparts. Ample evidence supports the district court's finding that TWA's desire for a stable work force was the dominant motivation for the 1964 distinctions.[11]

II.

The district court found that members of Local 773 (Space Center) favored elimination of system seniority restrictions from the supplemental agreement prior to the 1966 negotiations, and that officials of the IAM made several misstatements from 1966 to 1970 regarding the IAM's efforts and enthusiasm in attempting but failing to achieve this gain.

The first misstatements occurred after the 1966 negotiations failed to produce for the appellants the de-

11. Testimony by Mr. Filson (App. 239a-243a) detailed TWA's fears of disruption by employment swings if employment at the Space Center operation were fully integrated with the rest of the TWA system. Problems of seasonal system layoffs, the prospect of temporary mass migration of aircraft line station employees to the Space Center, and the difficulty of meshing work skills between the aircraft-oriented system and the missile-lauching operations were company concerns articulated by TWA during the 1966 negotiations. See App. 1533a-1534a (minutes of 1964 negotiations) and App. 132a-133a, 139a-140a (deposition testimony of D. C. Crombie, TWA's vice president for industrial relations). According to Mr. Crombie:

> Our [TWA's] objective was to provide a certain segregation of the [Space Center] work group because we felt that the job of putting together a work force down there from the beginning and rising rapidly to 1500, 2000 people, was quite a difficult job under the time stringencies of the agreement . . . with the Government.
>
> We wanted to have assurances that those people would be a relatively stable group of people when we got them on and when they became experienced they would stay and they wouldn't be fleeing to Kansas City and Los Angeles. . . . I am talking now in terms of company objectives.

App. 139a-140a.

sired abolition of seniority restrictions. Employees at the Space Center, acting through Local 773, had submitted such a proposal to the District Lodge 142 (national) bargaining committee.

When the 1966 negotiations reached an impasse, Space Center employees, along with their TWA counterparts throughout the system, went on strike. IAM officials William J. Usery (a representative of the International, later U. S. Secretary of Labor), and Carl Gordon (District Lodge 142 assistant chairman) urged members of Local 773 to return to work to avert the danger of binding arbitration legislation then pending in a Congress concerned with delay in the space program. The district court found that Usery and Gordon also assured the Local 773 negotiators that the IAM was vigorously proposing to extend system seniority to Space Center workers at the ongoing national negotiations. The evidence also showed that Gordon and Usery said that there would be no difficulty in removing these restrictions. The Local 773 members returned to work under a tentative agreement, applicable only to the Space Center, which did not include retroactive system seniority rights. The national IAM-TWA agreement, reached four weeks later, did not eliminate the system seniority restrictions.

The assurances to Local 773 indicating IAM's expectation of success in negotiations, as well as a later statement by Gordon advising Local 773 that the District Lodge had done the best it could but that TWA had attached unacceptable strings to the proposal, were found to be misstatements constituting bad faith, inasmuch as the proposal had in fact scarcely been discussed with TWA.

The appellant urges that members of Local 773 returned to work and ratified the supplemental and national agreements in reliance upon the IAM's misstatements. The district court, however, did not so find, and the testimony

of Local 773 negotiator M. J. Reilly,[12] cited by appellant, does not support the assertion of detrimental reliance. There was evidence that the Space Center employees returned to work in 1966 because the avoidance of legislation compelling arbitration was of paramount importance to both the IAM and Local 773.[13] The evidence does not demonstrate that members of Local 773, had they been told the truth in 1966 that their union would not press for the proposed seniority rights, would have refused either to end the strike or to ratify the supplemental and national agreements. Approval of the 1966 contract was recommended by Local 773's leadership, and it was ratified by the members.

The second round of alleged misstatements occurred during the 1969-70 negotiations. The Local 773 members had submitted a second proposal in 1967, again urging the IAM District negotiators to demand incorporating the Space Center employees into the TWA system with retroactive seniority. In the November, 1968, exchange of proposals, the District Lodge and TWA both favored retroactive system seniority. In May, 1969, Mr. Gordon reported that the Space Center seniority issue was "very close to settlement" but cautioned that "[a]ny full report at this time might vary from the final draft."[14] Following receipt by the IAM negotiators of a written TWA proposal to grant retroactive system seniority, two officials of District Lodge 142 (Barker and Fowler) reported to the membership of Local 773 that a retroactive system seniority agreement had been negotiated.

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12. App. 493a-501a.

13. App. 494a-495a.

14. *See* App. 1634a-1635a, 512a-513a, 701a-702a. Mr. Gordon was the chief negotiator for IAM in the discussions leading to the 1970 contract.

In August, 1969, the situation changed when the Space Center suffered its first layoffs after five years of rapid growth. The district court found that opposition to Space Center seniority grew within the IAM; petitions were circulated throughout the TWA system by members of Local 1650 in Kansas City, which had the largest membership of any IAM local lodge, with 40 per cent of the District's membership. The intra-union opposition stemmed from the fear of system employees that, in view of the imminent reductions in force at the Space Center, a retroactive grant of system seniority would result in furloughed Space Center workers bumping others with lesser seniority throughout the system. Local 773 at the Space Center, aware of this opposition, sent letters and telegrams urging support for retroactive system seniority.[15]

The negotiating committee of District Lodge 142, sensing the growing opposition to system seniority within the union, voted to remove its own proposal in late November because the committee decided that a contract with such a provision might not be ratified. The members of Local 773 were not advised of this decision; instead, IAM officials advised them that TWA was attaching a no-strike agreement to this proposal. Meanwhile, a TWA official advised several officers of Local 773 that TWA did not oppose the proposal.[16]

15. Petitions opposing retroactive seniority bearing some 2,900 signatures were submitted to the IAM leadership by TWA employees at Kansas City, New York and Los Angeles. In response to the petitions, a member of the District Lodge negotiating team went to New York and Kansas City and reported back that a contract providing retroactive system seniority for the Space Center would not be ratified due to heavy opposition.

16. Whether TWA actually offered any opposition to the proposal by attaching "strings" is unclear. The district court found that the "primary reason" that retroactive system seniority was not achieved was "the fear and the risk that the contract would not be ratified because of opposition by TWA workers at other system locations" (App. 1393a). TWA was found to have "included such a proposal in the early negotiations and at no time strongly opposed such a provision" (App. 1402a). The union points out that TWA's negotiator was still asking for a no-strike requirement for the Space Center as late as January 12, 1970 (App. 1161a, 1204a-1205a), the day before final sign-off by the International and TWA. Nonetheless, ample evidence supports the district court's finding that IAM negotiators withdrew their proposal for retroactive system seniority and that only the proposal for prospective seniority, as suggested by Fowler of the District Lodge, received consideration by the negotiators during the weeks prior to final agreement in January, 1970.

The final agreement implicitly rejected retroactive system seniority for the Space Center employees, and it included a provision for accrual of prospective seniority only, as suggested by James Fowler, assistant chairman of District Lodge 142. All TWA employees initially hired at the Space Center began to accrue system seniority as of the date of the contract, January 28, 1970, and received no credit for prior working years at the Space Center in the event of transfer to a station on the system.

This contract required ratification by a majority of the entire IAM union membership employed by TWA. Two ratification meetings were held for the Space Center workers of Local 773. Mr. Fowler met first with the executive board of Local 773, and then with the entire Local 773 membership, and to both groups he repeated the admittedly false statement that the union had done everything in its power to obtain retroactive system seniority, but that TWA had attached unacceptable conditions to the proposal.

The 1970 contract was found to have been advantageous to the union with beneficial pension and wage improvements and a revamped procedure for grievances and arbitration. The Local 773 membership ratified the contract, despite knowledge of the lack of a favorable system

seniority provision, by a vote of 714-69, and nationally the contract was ratified by an overwhelming margin. There is no evidence that the voting outcome would have been different had the members been told the truth about the union leadership's unwillingness to achieve retroactive system seniority. Based on the total national vote, even if all Space Center voting members had voted "no," the contract would still have been ratified by a national margin of almost 3 to 1.

Finally, the trial judge found that there was no evidence of TWA's participation in the misleading and incomplete communications from the IAM to Local 773.

III.

We first consider whether the IAM breached its duty of fair representation by favoring and entering into an agreement with TWA which provided Space Center employees with seniority rights different from those held by all other members of the union.

The origin of the doctrine of the duty of fair representation rests in the landmark case of *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944), which held that a union certified under the Railway Labor Act [17] to represent all employees of a collective bargaining unit may not enter into a collective bargaining agreement which favors white union members at the expense of black non-member employees in the bargaining unit. The Supreme Court found that the Railway Labor Act requires "that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." *Id.*

17. As in *Steele v. Louisville & Nashville R. R. Co., supra*, the union herein was the certified bargaining representative under § 2 (Fourth) of the Railway Labor Act, 45 U. S. C. § 152 (Fourth) (1970).

202. The Court went on to state that this duty does not mean that a union cannot make contracts which unfavorably affect some members, but those variations must be "relevant to the authorized purposes of the contract in conditions to which they are to be applied . . . ." *Id.* 203. In finding that union discrimination based upon race in a collective bargaining agreement is impermissible, the Court concluded:

> [I]t is enough for present purposes to say that the statutory power to represent a craft and to make contracts . . . does not include the authority to make among members of the craft discriminations not based on such relevant differences. *Id.*

The early cases focused upon racial distinctions in the railroad industry,[18] but the duty was soon applied to cases of non-racial discrimination and to industries reached by the National Labor Relations Act.[19] It is clear that a union which is the exclusive bargaining agent has a federally-created statutory duty to fairly represent all members of the bargaining unit in the negotiation, administration and enforcement of the collective bargaining agreement.[20]

18. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949).

19. *See Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *Syres v. Oil Workers International Union*, 350 U. S. 892 (1955).

20. The development of this important labor law doctrine has been chronicled elsewhere and need not be repeated here. *See Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554, 563-567 (1976); *Vaca v. Sipes*, 386 U. S. 171, 177-188 (1967); *Humphrey v. Moore*, 375 U. S. 335, 342 (1964); *Bazarte v. United Transp. Union*, 429 F. 2d 868, 871-872 (3d Cir. 1970); *Brady v. TWA, Inc.*, 401 F. 2d 87, 94 (3d Cir. 1968), *cert. denied sub nom. IAM v. Brady*, 393 U. S. 1048 (1969); *see also* Clark, The Duty of Fair Representation: A Theoretical Structure, 51 *Texas L. Rev.* 1119 (1973); Cox, The Duty of Fair Representation, 2 *Vill. L. Rev.*, 151 (1957).

The requirements of fair representation were summarized by the Supreme Court in *Vaca v. Sipes*, 386 U. S. 171, 177 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

The case law indicates that seniority differences and seniority adjustments among employee groups governed by a single contract are within the union's discretion and judgment, so long as the seniority disadvantage is not the result of arbitrary reasons unrelated to relevant differences. Thus, seniority differences disadvantageous to a segment of a collective bargaining unit have been upheld in, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *Humphrey v. Moore*, 375 U. S. 335 (1964); *Price v. International Brotherhood of Teamsters*, 457 F. 2d 605 (3d Cir. 1972); and *Bruen v. Electrical Workers Local 492*, 425 F. 2d 190 (3d Cir. 1970), where the distinctions were found to fall within the range of reasonableness which governs the union's fiduciary responsibility to its members.[21]

In *Ford Motor Co. v. Huffman, supra*, seniority distinctions in favor of previously-employed veterans return-

21. Other cases finding non-arbitrary reasons for seniority distinctions based on relevant differences include: *NLRB v. Whiting Milk Corp.*, 342 F. 2d 8 (1st Cir. 1965); *Hiatt v. New York Central R. R.*, 444 F. 2d 1397 (7th Cir. 1971); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F. 2d 853 (8th Cir. 1975); *Laturner v. Burlington Northern, Inc.*, 501 F. 2d 593 (9th Cir. 1974), *cert. denied*, 419 U. S. 1109 (1975); *Northeast Master Executive Council v. CAB*, 506 F. 2d 97 (D. C. Cir. 1974), *cert. denied*, 419 U. S. 1110 (1975).

ing from war were found to be valid since the collective bargaining agreement could reasonably reward employees who had been called away from their jobs in wartime to perform services in the national interest. "Inevitably," according to the Supreme Court, "differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. . . . A wide range of reasonableness must be allowed" to the union, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U. S. at 338.

Likewise, in the context of a consolidation of the operations of two companies, the union representing the relevant employee units at both companies could validly favor a meshing of seniority to establish a master list, even though the combined seniority system disadvantaged the union members who had been employed by the younger of the two consolidated companies. *Humphrey v. Moore, supra*. This dovetailing of seniority lists was found to be "neither unique or arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption. . . ." 375 U. S. at 347. In such a case of inevitable conflict, the union must be free to take a stand, even if that position is contrary to the interests of a group of members. 375 U. S. at 349-350. It is "inevitable" that the absorption, merger or elimination of one enterprise by another will hurt some employees to the extent that fewer total jobs are available.

This court's decision in *Price v. International Brotherhood of Teamsters, supra*, recognized the wide latitude to be accorded to the decision to dovetail seniority lists where a company decides to close down one of its operations. The joint list included employees of a closed trucking ter-

minal, to the disadvantage of system employees with lesser seniority. This arrangement was held not to be arbitrarily discriminatory either against the junior system employees who were subsequently "bumped" or against several employees of the closed terminal who had previously transferred to the system with no seniority under an earlier agreement. The *Price* decision, however, depended also upon a factor not present here; namely, that the decision was reached by a joint grievance committee, the equivalent of arbitrators under the contract. Congressional policies favoring arbitration of labor disputes dictate that such a decision will not be overturned unless it is "dishonest, capricious, or beyond its authority under the collective bargaining agreement." *Price v. International Brotherhood of Teamsters, supra,* 457 F. 2d at 611. The union committee's duty was discharged when it gave the contending sides an opportunity to make their case and then made a decision honestly and impartially. *Id.*

The instant case presents a closer question than existed in *Price* because the dispute arises from a negotiated agreement rather than an arbitrator's decision. Furthermore, unlike the dovetailing cases discussed *supra,* this case involves a separate seniority roster for the Space Center with endtailing of seniority upon transfer to the system prior to the 1970 contract and limited dovetailing based upon the artificial Space Center seniority date thereafter.

Nonetheless, this court is persuaded, as was the court below, that the seniority distinctions in the instant case fall within the zone of reasonableness by which a union's conduct must be measured. As discussed above, a certified bargaining agent offends the duty of fair representation if it enters a collective bargaining agreement which makes arbitrary distinctions between classes of employees

within the appropriate unit which are not based on relevant differences between the employees or operations.

The district court found that the policy of denying system seniority benefits to Space Center members of IAM was a seniority distinction based upon recognition of relevant differences betwen the Space Center operation and the rest of the TWA system. It then found that the 1964 supplemental agreement reflected TWA's desire to minimize movement between the Space Center and the system in order to achieve a stable work force. These factual conclusions are not clearly erroneous, and therefore they are accepted by this reviewing court.

TWA's desire for a stable work force was based upon TWA's sufficiently reasonable belief that differences in skills and the prospects of "snowbird" transfers between the system and TWA would disrupt operations both at the Space Center and throughout the airline system, unless transfers were curtailed. The motivation for the separation was not arbitrary.

Furthermore, that reciprocal barriers were erected as part of TWA's separation policy in order to discourage system employees from transferring to the Space Center also demonstrates the reasonableness of the seniority distinctions. The lack of system seniority was hardly arbitrarily disadvantageous to the Space Center employees who were simultaneously protected from being "bumped" by senior system employees; the Space Center employees carried no more than a fair and reasonable share of the burden of the TWA separation policy.

The appellants argue that the seniority distinction in the instant case is indistinguishable from a discriminatory provision of the contract between TWA and IAM which was found by the Second Circuit to be invalid in *Jones v. Trans World Airlines, Inc.,* 495 F. 2d 790 (2d Cir. 1974).

In *Jones*, the IAM and TWA agreed that certain non-union Passenger Relations Agents at Kennedy Airport in New York would henceforth be included in the unionized "Guards" classification, since both groups performed similar duties. The Passenger Relations Agents were subsumed into the Guards category, but they were given endtail seniority at the bottom of the Guards list regardless of prior length of employment with TWA. The Second Circuit held that the non-union Passenger Relations Agents were *de facto* members of the represented Guard unit for negotiating purposes leading to the 1970 contract, and as such they were entitled to seniority rights under the existing 1966 contract which could not be taken away discriminatorily by the union's bargaining team in the 1970 contract negotiations. 495 F. 2d at 797. The court found that the only factor distinguishing the favored Guards from the disfavored former Passenger Relations Agents was the fact of prior non-membership in the union. Where the two groups performed almost identical duties prior to 1970, non-membership was an arbitrary distinction which was impermissible under the union's duty of fair representation to all members of the bargaining unit.

Jones thus stands for the limited and undisputed proposition that discrimination against non-member employees who are part of the bargaining unit is impermissibly arbitrary if no relevant distinctions exist between the union and non-union employees. The court held, 495 F. 2d at 797, that "[d]iscrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit." It emphasized that "we do not suggest that a union has a duty to dovetail seniority when consolidating two groups of employees. . . . We hold only that union membership was not a proper

ground for determining seniority."[22] Thus, the Second Circuit's decision can give little support to the position of the Space Center employees herein, because the distinctions in seniority did not arise from non-membership in the union but instead were related to meaningful differences between the Space Center and the airline system which were reflected in TWA's policy of discouraging transfers. 495 F. 2d at 798.

Similarly, the instant action does not involve a union attempt to reduce or cancel seniority benefits already conferred upon a minority in a pre-existing agreement. *See Barton Brands, Ltd. v. NLRB*, 529 F. 2d 793, 800 (7th Cir. 1976); *Hargrove v. Brotherhood of Locomotive Engineers*, 116 F. Supp. 3 (D. D. C. 1953). The courts in such cases have held that the union breaches its duty of fair representation to the minority unless it can demonstrate "some objective justification for its conduct" to render such discrimination non-arbitrary.[23] The 1966 and 1970 agreements herein did not deprive the employees of any accrued seniority benefit.

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22. *Jones v. TWA, Inc., supra*, is part of a well-established line of fair representation cases which have determined that discrimination based upon non-membership in the union is unreasonable and arbitrary. *See Steele v. Louisville & Nashville R. R.*, 323 U. S. 192 (1944) (involved discrimination against Negroes who were non-members of the union); *Radio Officers' Union v. NLRB*, 347 U. S. 17, 46-48 (1954) (concerned wage discrimination against non-members of representative union); *see generally* Clark, The Duty of Fair Representation: A Theoretical Structure, 51 *Texas L. Rev.* 1119 (1973).

23. *Barton Brands, Ltd. v. NLRB, supra*, 529 F. 2d at 800. Endtail seniority has been upheld in numerous cases where the endtailing was not arbitrarily discriminatory, such as in consolidations where it is held not unreasonable to endtail the employees of the newly acquired or defunct operations. *See, e.g., NLRB v. Whiting Milk Corp.*, 342 F. 2d 8 (1st Cir. 1965); *Morris v. Werner-Continental, Inc.*, 466 F. 2d 1185 (6th Cir. 1972), *cert. denied*, 411 U. S. 965 (1973); *Schick v. NLRB*, 409 F. 2d 395 (7th Cir. 1969).

The achievement of prospective system seniority in 1970, establishing an artificial 1970 seniority date for employees wishing to transfer to or from the Space Center, likewise was not unfairly discriminatory. Undoubtedly, Space Center employees who transferred into the airline system after 1970 have suffered layoffs due to their artificially low system seniority, which would not have occurred if the 1970 agreement had instead reckoned system seniority retroactively from the date of entry into the employee's relevant job classification. In effect, the Space Center employees were required by the pre-1970 provisions to forego system seniority accrual in return for job security at the Space Center by means of protection from incoming transfers. This protection was hardly false or illusory. We cannot say that the 1970 agreement's failure to provide Space Center employees with retroactive system credit for the periods of work performed while receiving significant job security benefits was arbitrary, unreasonable or invidiously discriminatory.

If, on the other hand, the 1970 agreement had conferred retroactive system seniority upon Space Center employees, effectively dovetailing the existing seniority lists, the displaced low seniority system employees who had endured pre-1970 layoffs and slower promotions might equally well be heard to complain that the pre-1970 restrictions against their transfer to the greener pastures of the Space Center had unfairly discriminated against low-seniority system employees without conferring any offsetting benefit of separation.

Accordingly, we conclude that the district judge did not err when he found that the plaintiffs failed to demonstrate that the seniority differences in the 1964, 1966 or 1970 collective bargaining agreements constituted a breach by their union of the duty of fair representation.

IV.

We next consider whether the deliberate misstatements of union officials to employees at the Space Center violated the union's duty of fair representation. As framed by the district court,[24] the question for review is as follows:

> Is a union liable to a segment of its members because union officials lied to that segment of members concerning the union's efforts to secure certain seniority rights, in order to obtain membership ratification of a negotiated contract, where there is no proof that the contract would not have been ratified had those members been told the full truth?

The district court answered in the affirmative, finding union liability for the false statements. We reverse because false statements may not create liability under the federal labor laws absent a showing of tangible injury proximately resulting from a falsehood.

Although the question for review focuses upon misstatements during the course of the Space Center ratification of the 1970 contract, it is clear that the district court was influenced by what it termed a "web of deceit" by IAM officials reaching back to 1966.[25] We think that the IAM's conduct from 1966 to 1970 must be assessed by the standard required in the fair representation doctrine because we recognize that the cumulative effect of falsehoods over that period of time heightened the importance of the 1970 misstatements immediately prior to the ratification vote at the Space Center. Even the inclusion of the 1966

24. See Opinion and Order (Jan. 30, 1976) (entering Rule 54(b) final judgment and certification for 28 U. S. C. § 1292(b) interlocutory appeal), App. 1424a, 1428a.

25. App. 1402a. The district court, after tracing the development of fair representation doctrine, recounted the instances of deceitful statements to Space Center employees from 1966 onward, as discussed herein in Part II, *supra*.

misstatements, however, does not alter the analysis which follows, inasmuch as the district court did not find that the IAM's 1966 promises caused injury, such as through detrimental reliance by the members at the Space Center in returning to work or ratifying the 1966 agreement. Similarly, the 1970 IAM misstatements placing the onus of compromise upon TWA, while admittedly false, were not found to have caused ratification of the contract which would not otherwise have been ratified had the truth been told.[26]

Preliminarily, we reject the IAM's claim that the duty of fair representation does not extend to union conduct in contract ratification voting. Citing the decision in *Confederated Independent Unions v. Rockwell-Standard Co.*, 465 F. 2d 1137 (3d Cir. 1972), the union would foreclose liability in post-negotiation intra-union balloting. In that case, the court rejected a claim that federal law affords employees the right to approve or reject the contract negotiated by the union on their behalf, holding:

> The law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by-laws or rules and regulations of the union [citations omitted]. 465 F. 2d at 1140.

26. Although conceding that there is no proof that the IAM's misstatements colored the outcome of the vote to ratify the 1970 contract, the employees assert (in Reply Brief for Appellants at 17-19) that they nonetheless were damaged because the misstatements covered up the union's conduct. Had they known the truth, they now say, they might have challenged the union's original recognition as bargaining representative, or they might have sought separate representation. Such speculative, *post hoc* reasoning does not suffice to demonstrate concrete injury caused by the misstatements absent supporting evidence in the record below.

The converse, however, is also true: federal law does require a ratification vote if the union constitution or by-laws require it. In the instant case, the 1970 ratification vote *was* required by the union constitution.[27] We see no reason why the fiduciary duty of fair representation, inasmuch as it applies to the negotiation, administration and enforcement of the collective bargaining agreement, should not be applied with equal force to union conduct in the ratification process where such ratification is required by the agreement or by the constitution, by-laws or rules and regulations of the union.

Although it is clear that a bargaining agent must be honest and forthright in dealings with its members, and "as the statutory representative of the employees [it] is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion,' *Ford Motor Co. v. Huffman, supra*, at 338," *Hines v. Anchor Motor Freight*, 424 U. S. 554, 565 (1976), the federal courts have consistently required a direct nexus between breach of this duty and resultant damages to the individual or minority segment as an element of liability. For example, in *Hines v. Anchor Motor Freight, supra*, the Supreme Court found that an erroneous arbitration decision could not stand, despite the strong policy of labor law favoring the finality of arbitration of grievances when so provided in a collective bargaining agreement, if "the employee's representation by the union has been dishonest, in bad faith or discriminatory" so as to "seriously undermine the integrity of the arbitral process." *Id.* 561, 567. The union's breach of duty must be found to have "contributed to the erroneous outcome of the contractual proceedings." *Id.* 568.

27. The IAM concedes that, a strike vote having been approved in 1969, the contract ratification vote was required by Art. VIII, § 4 of the IAM Constitution. Brief for Cross-Appellant Unions at 26 n. 9.

Similarly, in *Humphrey v. Moore, supra,* a group of employees alleged inadequate union representation in a seniority dispute which was submitted to a joint conference committee for resolution after a hearing. The Supreme Court rejected this contention because the employees failed to demonstrate "that the result would have been different had the matter been differently presented." 375 U. S. at 350-351.

The decisions of this court, while requiring a union's conduct toward its members to adhere to the fiduciary standards inherent in its position as bargaining agent, *Brady v. Trans World Airlines, Inc.,* 401 F. 2d 87, 94 (3d Cir. 1968), *cert. denied,* 393 U. S. 1048 (1969), have nonetheless implicitly required a demonstration of injury to the members proximately caused by the breach.[28]

Furthermore, numerous labor law decisions limiting relief only to redress of specific injuries and refusing to impose punitive sanctions also indicate that liability in the instant case may not be found in the absence of injury proximately caused by the misrepresentations. In the absence of such injury, any remedy against the union would necessarily be a "punishment" for a harmless lie. Punitive damages have been consistently rejected in un-

28. For example, in *Bieski v. Eastern Automobile Forwarding Co.,* 396 F. 2d 32 (3d Cir. 1968), the jurisdictional decision of a joint union-management committee in a seniority dispute was found to be arbitrary and unreasonable. This court was persuaded that the union's neutrality may have deprived the losing segment of effective advocacy of their position before the joint committee. Citing *Humphrey v. Moore, supra,* 375 U. S. at 351, the court found a sufficient probability that "the result would have been different had the matter been differently presented," 396 F. 2d at 40, thus establishing the nexus to injury occasioned by the procedure which produced the erroneous decision.

Similarly, in *Brady v. TWA, Inc., supra,* 401 F. 2d at 99-100, the union's refusal to accept Brady's past dues and consequent wrongful expulsion of Brady from the union was found to be the direct cause of Brady's loss of employment.

fair labor practice cases under the National Labor Relations Act, *see Republic Steel Corp. v. NLRB,* 311 U. S. 7, 10-12 (1940); *Carpenters Local 60 v. NLRB,* 365 U. S. 651, 655 (1961); *NLRB v. United States Steel Corp.,* 278 F. 2d 896, 900-901 (3d Cir. 1960), *cert. denied,* 366 U. S. 908 (1961); in actions for recovery of tortious damages under § 303 of the Labor-Management Relations Act, 29 U. S. C. § 187, *Teamsters Local 20 v. Morton,* 377 U. S. 252, 260- 261 (1964); and in actions arising under § 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, *United Shoe Workers v. Brooks Shoe Mfg. Co.,* 298 F. 2d 277 (3d Cir. 1962) (per curiam en banc), in which Chief Judge Biggs, concurring, found that "it is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments." *Id.* 284.[29]

There is no indication that the Railway Labor Act deviates from this general pattern of remedies, at least with respect to union misconduct. Reballoting is the statutory remedy for instances where a vote has been impaired by misconduct of the carrier. Section 2 (Ninth) of the Railway Labor Act, 42 U. S. C. § 152 (Ninth). Criminal sanctions are imposed by Section 2 (Tenth) of the Act upon carriers (and not unions) but only with respect to willful failure or refusal of a carrier to comply with the certain of the Act's duties, such as the duty to refrain from interference with the organization chosen by the employees. 42 U. S. C. § 152 (Tenth).

We need not decide whether any circumstances exist in which a punitive-type remedy on behalf of employees against a union for union misconduct might be implied

29. See also the much-quoted statement of Judge Learned Hand who ruled in *Western Union Telegraph Co. v. NLRB,* 113 F. 2d 992, 997 (2d Cir. 1940) that liability under the labor law must rest on "proof that 'the unfair labor practice' actually impinged upon the putative victims and caused them pecuniary damage."

under the Railway Labor Act. In the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the Act.

In conclusion, we hold that liability for a labor union's deceptive conduct in breach of the fiduciary duty of fair representation arises only if the breach directly causes damage to an individual or group to whom the duty is owed. There is no liability in this case where false statements by union officials concerning the union's efforts and bargaining position did not materially affect the result of the subsequent ratification vote.

V.

The judgment of the district court in No. 1369 will be affirmed. The judgment of the district court in No. 1535 will be reversed, and the cause will be remanded for further action consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

Nos. 76-1369 and 76-1535

—

CHARLES DEBOLES
309 Jefferson Street
Media, Pennsylvania
and
VIRGIL O. GRIFFIS
1400 Manley Road
Walnut Hills
Apt. B-3
West Chester, Pennsylvania

On behalf of themselves as individuals and on behalf of all others similarly situated,
Appellants in *No. 76-1369*

v.

TRANS WORLD AIRLINES, INC.
Philadelphia International Airport
Philadelphia, Pennsylvania
and
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; District Lodge 142, IAMAW, AFL-CIO; Local Lodge 1776, IAMAW, AFL-CIO
520 Main Street
Darby, Pennsylvania

Charles Deboles, Virgil O. Griffis, International Association of Machinists and Aerospace Workers, AFL-CIO, International Association of Machinists and Aerospace Workers, District Lodge 142 and IAMAW Local Lodge 1776,

Appellants in *No. 76-1535*

(D. C. Civil Action No. 71-2945)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and WEIS, *Circuit Judges* and GERRY *, *District Judge.*

* John F. Gerry, United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on November 8, 1976.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed January 30, 1976, and appealed at our No. 76-1369 be, and the same is hereby affirmed. It is further ordered that the judgment of the said district court appealed at our No. 76-1535 be, and the same is hereby reversed and the cause remanded for further action in accordance with the opinion of this Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 71-2945

CHARLES DEBOLES, et al.

v.

TRANS WORLD AIRLINES, INC., et al.

FINAL ORDER AND JUDGMENT.

AND NOW, this 19th day of May, 1977, upon the remand of Civil Action No. 71-2945 from the United States Court of Appeals for the Third Circuit, judgment is hereby entered in FAVOR of the defendants, International Associaiton of Machinists and Aerospace Workers, AFL-CIO; District Lodge 142, IAMAW, AFL-CIO; Local Lodge 1776, IAMAW, AFL-CIO and AGAINST the plaintiffs individually and as a class.

Judgment having heretofore been entered in FAVOR of the defendant, Trans World Airlines, Inc., AGAINST the plaintiffs individually and as a class, Civil Action No. 71-2945 is DISMISSED.

By THE COURT:
DONALD W. VAN ARTSDALEN, *J.*

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1865

CHARLES DEBOLES, *Petitioner*

v.

TRANS WORLD AIRLINES, INC.,
AND
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 142, IAMAW, AFL-CIO; LOCAL LODGE 1776, IAMAW, AFL-CIO, *Respondents*

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether after the Kennedy Space Center unit of Florida workers had long enjoyed the special job protection and rapid promotion benefits of separate unit seniority, the Railway Labor Act's fair representation rule required their union to bargain for them a retroactive seniority merger which would have permitted them to displace employees at other locations in the nation.

2. Whether a union official's misrepresentation to a group of Florida employees of the reason why in the new contract their national seniority merger was made prospective rather than retroactive, creates financial liability for the union where the national contract ratification ballot following the misleading statement was overwhelming and its results unaffected thereby.

COUNTER-STATEMENT OF THE CASE

In 1964 TWA was awarded the bid from the National Aeronautical and Space Administration to provide support services in Florida for space exploration, including the moon shot, at Merritt Island Launching Area (later renamed Kennedy Space Center). At the time, TWA had a collective bargaining agreement with International Association of Machinists and Aerospace Workers, AFL-CIO (114a) covering many employees on the TWA system in the aircraft industry. TWA officials approached IAM for the purpose of extending the basic labor agreement between TWA and IAM to KSC. Accordingly, a Supplement to the existing collective bargaining agreement was negotiated by TWA with IAM (P-3 at 1469a; 134a-135a; 137a-139a).

Employees of TWA at stations other than KSC prior to 1964, had "systemwide seniority" as part of their collective bargaining agreement. Under the TWA systemwide seniority, employees earn both the right to displace a less senior employee in the same classification or same location when faced with layoff, and the right to a preference bid for transfer to other jobs in the same classification at other locations on the system where vacancies exist (129a-130a). When the Supplement was negotiated in 1964 with IAM, TWA was willing to extend the basic economic provisions of the airline collective bargaining agreement to KSC, but wanted to protect the KSC work force from total integration with the system to avoid extensive turnovers from and to the system (139a-140a). TWA was concerned about the immediate as well as long range problems associated with start up of a Florida operation with a potential for as many as 2,000 jobs. The major concern was to avoid "snowbirds"—people who would bid down for the winter and bid back to the system for summer. In addition, TWA feared massive migration from any one station on the system to KSC, thereby practically eliminating the entire work force at one station, or closing it down temporarily (239a). Accordingly, the terms of the Supplement prevented system

employees from bidding for transfer to KSC on a preference bid and required any system employee who was accepted at KSC to remain for at least one year prior to bidding back on the system[1] (242a). In addition, to further discourage system transfers, TWA insisted that system employees could not exercise their system seniority at KSC for promotions, layoffs, shifts, vacations, etc. Conversely, newly hired KSC employees accrued no system seniority and had no right to bid to the system.[2]

When KSC opened, there were many higher classifications and lead position slots for which system people could not use their system seniority to bid in or advance at KSC (571a-572a). *Normally, on the system it took about eight years for an employee to reach lead mechanic or reach mechanic from stores clerk* (376a; 717a-718a). *At KSC, from 1964-1970, stores clerks rose to mechanic in seven months* (479a-480a). Seventy percent of the employees at KSC were represented by IAM, and of those, the majority of supervisory and lead jobs were held by people who were

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1. On the system there are two kinds of stations: line stations like Philadelphia and Los Angeles and overhaul bases like Kansas City Overhaul. Layoffs are seasonal in the airline industry and are heavy in winter at line stations and heavy in summer at overhaul stations (727a). Because KSC's insulation from bumping from the rest of the system was effective, KSC grew from 300 to 1200 employees and avoided the fluctuating layoffs experienced on other parts of the system (728a-729a). Thus, junior employees at KSC continued to work while their more senior counterparts elsewhere on the system were on layoff (726a).

2. Thus, in 1964, under the Supplement if a stores clerk in Los Angeles with a seniority date of March 31, 1964, sought a mechanic's opening at KSC, a KSC stores clerk with a seniority date of April 1, 1964, would have preference for that opening, despite the greater system seniority of the Los Angeles employee (244a). Similarly, the Los Angeles employee could not, in the event of a layoff displace the more junior stores clerk at KSC, while he could displace a more junior stores clerk elsewhere on the system (246a-247a).

new hires at KSC (231a-232a). TWA's insistence on and achievement of the provisions in the 1964 Supplement were designed to and in fact did produce a stable work force, not subject to the fluctuations or dislocations which were regularly experienced on the system.

In 1967 Local 773 sent a proposal to the District Lodge Convention to give KSC employees system seniority, and it was one of two KSC negotiating proposals adopted by the convention delegates (503a, 505a-508a; P-48 at 1632a). In consonance therewith, the Union's contract proposal in 1968 would have merged the KSC Supplement into the basic agreement with an extension of systemwide seniority to KSC employees (311a-312a). TWA, in its 1968 opening proposals, offered a system-seniority revision of the KSC Supplement conditioned on two years of continuous service at KSC prior to bidding out or back onto the system. The proposal would have dropped any reference to preference bids, which had been achieved in 1966 (218a-220a). William Malarkey, Chief TWA negotiator in 1968, testified that, retreating from its opening position on system seniority, TWA had tied the issue to a no-strike clause (375a-376a). TWA had further reservations about retroactive systemwide seniority during these negotiations, according to Malarkey. KSC had hired a large number of stores clerks as well as many other job classifications which were totally unknown and unused on the system. In addition, persons with job titles such as painter or welder at KSC lacked the skill to fill similar titles on the system (280a). TWA also feared that the effects of system seniority on some employees might result in the contract's rejection at a ratification meeting (324a). Thus, TWA refused systemwide seniority for KSC until all job classifications subject to transferability were worked out (371a-372a; 373a-374a).

In 1969 KSC experienced its first layoffs (355a-356a). Suddenly, stores clerks and ramp servicemen from KSC could post preference bids to come out onto the system (1109a-1110a). System employees who had been hired as

store clerks and maintenance persons saw themselves, under the proposed seniority change, subject to displacement by KSC workers who had enjoyed freedom from similar displacement by system employees (1110a). In September and October of 1969, petitions opposing retroactive system seniority arrived in IAM and TWA offices, containing some 2,900 signatures from TWA employees at Kansas City Overhaul Base, John F. Kennedy in New York, and Los Angeles (355a-356a; 1109a-1111a). The system employees' opposition was exemplified by a November 1969 petition by JFK workers (TWA-2 at 1686a) which reiterated their opposition to granting retroactive system seniority to KSC stores clerks, because a sudden space program cutback would result in mass layoffs at JFK. In addition to bumping in the event of layoffs, JFK employees and Overhaul Base employees objected that KSC employees would come onto the system with lead and classification seniority which they had earned much more rapidly than system employees (716a-717a).

The District Lodge Executive Board met in Washington, D.C. in late November, 1969. At that time, the strong opposition to system seniority at the three largest stations was reported to the Board (1056a-1057a). While members Dinkelmeyer and Celona argued for keeping the proposal on the table, the majority voted to withdraw retroactive systemwide seniority as a Union proposal (1056a-1057a; 1183a; 1185a). James Fowler of the District Lodge then proposed an alternative which is the clause that was finally adopted in January of 1970 and included in the 1970 contract. It provided for accrual of system seniority prospectively by KSC workers beginning in January of 1970 (1064a-1065a). After nearly a year and a half of negotiations, on January 13, 1970, the contract was signed by the Grand Lodge and TWA in the offices of the Federal Mediation and Conciliation Service in Washington, D.C. The contract was then submitted to the IAM-TWA membership for ratification, pursuant to an IAM regulation requiring such ratification votes.

James Fowler was assigned from District Lodge 142 to present the proposed contract for a ratification vote by many thousands of IAM's TWA members throughout the nation. At the KSC pre-ratification meetings, Fowler was questioned extensively about systemwide seniority and why it was not retroactive in the agreement (528a-530a; 927a-928a). He stated that TWA had attached unacceptable strings to that proposal including a no-strike clause and extra shifts at KSC (1115a). He said it was the best the Union could get (1115a). It is undisputed that all KSC members at the ratification meeting knew that they were not getting retroactive system seniority; they knew that people from the system could not displace them and that their own system seniority would accrue only upon ratification of the new collective bargaining agreement (1119a). Approximately 800 members attended the two ratification meetings at KSC, and cast a combined tally of 714 in favor and 69 against the contract (1119a; 1129a). A majority of all votes cast nationally in District Lodge 142 would determine ratification (1177a-1178a). *Based on the total national vote* (see D-4 at 1728a) *even if all KSC voting members had voted "no", the contract would still have been ratified by a national margin of almost 3 to 1.*

In 1971 TWA unexpectedly lost the NASA contract at KSC and many employees at KSC were laid off. Because of their January 28, 1970 system seniority, many did not have sufficient seniority to displace other employees on the system. Subsequently some of them commenced this class action to reform the 1970 contract, grant retroactive systemwide seniority, award lost back pay, reinstate, and grant attorney's fees and costs.

* * * *

A trial on the issue of liability resulted in findings and rulings which gave rise to this appeal. The District Judge

found that neither the separate seniority system established for KSC employees nor the Union's subsequent refusal to abolish it retroactively violated plaintiffs' rights under the Railway Labor Act. Thus, the Court described as follows (1387a-1388a) the separate seniority system at KSC, and the reasons for its adoption by TWA:

> "The 1964 MILA Supplement provided that new employees hired at KSC would not be listed on the system seniority roster and would not be permitted bid or displacement rights to other system locations. It also provided that system employees could bid for jobs at KSC only on a 'consideration basis,' that is, without the right to a job on the basis of seniority. System transferees could not use their system seniority for any purpose at KSC but had KSC seniority from the date of transfer. However, the system seniority continued to accrue for transferees to KSC (P-3), but they had to remain at KSC for one year before they were eligible to bid out. . . . TWA wanted to limit transfers from the TWA system to KSC to prevent wholesale and seasonal "snowbird" transfers from another station, to be able to ensure that the skills would be usable at KSC and to minimize disruption at KSC which would be caused by displacement of KSC employees . . . TWA needed a stable work force at KSC because of the vital importance of KSC to the national space program."

The Court emphasized that the separate seniority at KSC provided special benefits for the employees there. Not only were they protected from being displaced by senior employees from other locations (1388a), but "the rapid increase in the size of the work force at KSC provided promotional opportunities more rapidly than on the TWA system generally" (*id.*).

The District Court also found (1391a) that the proposal for retroactive grant of system seniority for the KSC employees met with serious opposition by members of Local Lodge 1650 in Kansas City, the largest local lodge of TWA workers, whose petitions opposing the retroactive change were prompted by "the fear of system employees that they would be subject to being bumped by KSC employees" (*id.*). Moreover, the District Court found (1391a-1392a) that when a member of the negotiating team was sent to Kansas City and New York to investigate the opposition to retroactive system seniority, he did not try to persuade employees to drop their opposition, because be believed that system seniority "would be impossible to apply retroactively and would be unfair to system employees."

On the basis of these findings, the District Court concluded (1401a) that the Union manifested no lack of unfair representation of KSC employees "in its conduct at the negotiating table." Applying the standard of this Court's governing rulings the Court (1398-1399a) found legitimate and nondiscriminatory reasons for the establishment and maintenance of the separate seniority system for the KSC employees. In particular, the District Judge found that many of the jobs at KSC involved skills that were unique to that station, which TWA chose to isolate from the rest of the system. The Court found this a legitimate consideration, which was evidenced by the endtailing of system transferees to the KSC seniority list (*id.*).

Having thus rejected plaintiffs' claim that the establishment and maintenance of the separate seniority system for KSC employees violated union duties under the Railway Labor Act, the District Court nevertheless found that the Union violated the fair representation duty by false assertions made to KSC employees prior to their vote on the ratification of the 1970 agreement. The crux of the falsehood found by the District Court (1393a) was the attempted diversion of responsibility to TWA:

> "James Fowler, Assistant Chairman of District Lodge 142, went to KSC to conduct a ratification meeting. First he met with the executive board of Local 773 and advised them that the union had done everything within its power to obtain retroactive system seniority but that TWA had attached unacceptable conditions to the proposal and that system seniority for KSC workers effective as of the signing of the agreement was the best that could be done. . . . The primary reason that the union officials did not obtain retroactive system seniority for KSC employees was the fear and the risk that the contract would not be ratified because of opposition by TWA workers at other system locations. . . . At the ratification meetings, Fowler repeated his statements that the union had done everything it could to secure retroactive system seniority, but that TWA had attached unacceptable conditions to it."

Based on this finding the District Court (1403a) held the Unions liable for "the misleading and incomplete communications from the IAM to the KSC employees." The District Judge then certified in an order of January 29, 1976 (1431a) "that the Order entered on October 31, 1975, on the issue of liability against the defendants" involves a controlling question of law, within the meaning of 28 U.S.C. §1292(b). In the accompanying opinion, the District Judge stated as follows (1424a-1425a; 1428a):

> "The basis of liability is that the union officials deceived the plaintiff class regarding the union's efforts in the negotiations to secure equal seniority rights for the Kennedy Space Center employees, and told them falsehoods just prior to the membership ratification vote on the agreement. So far as I can determine, the basis upon which liability is imposed is without controlling appellate guidance . . . .

"One possible way of stating the legal question involved is as follows:

> Is a union liable to a segment of its members because union officials lied to that segment of members concerning the union's efforts to secure certain seniority rights, in order to obtain membership ratification of a negotiated contract, where there is no proof that the contract would not have been ratified had those members been told the full truth?"[3]

The Court of Appeals answered that certified question in the negative, and it affirmed the District Court's finding that there was no discrimination in the refusal to grant retroactive seniority integration to the Space Center employees, who had enjoyed the benefits of their separate

3. While the District Judge stressed the absence of proof that the contract "would not have been ratified" had KSC members been told the full truth, it is noteworthy that many KSC employees knew the truth and were not misled by the representation made to them just prior to their balloting. Not only had KSC members been apprised months earlier of the protest petitions from Kansas City and elsewhere against retroactive seniority, they had also been told the facts both by District Lodge and TWA officials. Thus the District Judge found (1391a) that petitions against retroactive seniority were circulated throughout the TWA system in September and October of 1969; and (1392a) that when the KSC officers learned about them in the following month, KSC letters and telegrams were sent urging the opposing position. Moreover, the Court found (1392a) that a TWA official had also informed KSC officers that the company did not oppose retroactive seniority. In addition, there was no uncertainty or mistake in the mind of any KSC member as to what the contract contained. Under these circumstances, the District Court's finding of no material effect of the misrepresentation is supported both by the national vote results and the absence of proof that the KSC members were actually misled by Fowler's assertions prior to the balloting at KSC. Cf. *Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128, 1132 (3d Cir. 1972), *cert. denied*, 409 U.S. 1126.

seniority in the years before 1970 (Pet. A.29). In that respect, the Court of Appeals (Pet. A.34-35) agreed with the District Court that in 1964 separate seniority for the Kennedy Space Center employees was "one part of a package of special jobs stability provisions . . . many of which benefitted the appellants to the detriment of their system counterparts. Ample evidence supports the district court's finding that TWA's desire for a stable work force was the dominant motivation for the 1964 distinctions." The Court also emphasized (Pet. A.32) that under the 1964 agreement a Space Center employee was "*free from concern for losing his or her job to a non-Space Center person with greater seniority*"; that during the growth of the space effort in the 1960s, "*promotions occurred significantly more rapidly for Space Center employees than for their counterparts elsewhere in the TWA system*" (*id.*); and that "*layoffs were rare at the Space Center, in contrast to the regular TWA stations*" (Pet. A.33).

The question certified by the District Court was answered in the negative by the Court of Appeals (Pet. A.49-54) "because false statements may not create liability under the federal labor laws absent a showing of tangible injury proximately resulting from a falsehood" (Pet. A.49). The Court applied that rule here (Pet. A.39-40) under the following circumstances:

> "The 1970 contract was found to have been advantageous to the union with beneficial pension and wage improvements and a revamped procedure for grievances and arbitration. The Local 773 membership ratified the contract, despite knowledge of the lack of a favorable system seniority provision, by a vote of 714-69, and nationally the contract was ratified by an overwhelming margin. There is no evidence that the voting outcome would have been different had the members been told the truth about the union leader-

ship's unwillingness to achieve retroactive system seniority. Based on the total national vote, even if all Space Center voting members had voted "no", the contract would still have been ratified by a national margin of almost 3 to 1."

* * * *

Under these circumstances only two questions are presented to this Court.[4] The first arises from the ruling by both courts below that the Florida employees could not fairly demand to be merged into the national seniority roster retroactively rather than prospectively. The second arises upon the finding by both lower courts that the misleading statement to the Florida employees did not affect the outcome of the national ballot, and the ruling below that absent tangible injury false statements do not create union liability under federal labor laws. Neither ruling warrants this Court's grant of review.

4. All five of petitioners' "questions presented" are flawed and some clearly are not even presented. Their first question assumes union instigation of the separate seniority for Florida employees, but both courts below found it was the employer's desire which led to that arrangement. The second question is one on which the petitioners actually prevailed in the court below (see Pet. A. 51, 54) and thus clearly cannot be presented by them for this Court's review. The third question assumes fellow-employee hostility as the "sole reason" for denial of retroactive seniority whereas the courts below recognized the basic unfairness of such retroactivity. The fourth question was neither presented to nor decided by the courts below, and its attack on the Union's contract ratification practice is futile because if the Union had never invoked a ratification process the result for all the employees would have been exactly the same. The fifth question assumes for its premise a discrimination in the seniority compromise which both courts below have refused to find.

REASONS FOR DENYING THE WRIT

1. Upon a full trial of the facts, the District Judge found no discrimination in a negotiated compromise between conflicting employee interests by which the separate unit of Kennedy Space Center workers was integrated into the nationwide seniority plan prospectively but not retroactively. A unanimous Court of Appeals has affirmed that finding and there is nothing to impugn the nondiscrimination conclusion of the two courts below[5]. On the contrary, petitioners' claim is actually a demand for discrimination in their favor: they want the cake they have eaten. For many years, petitioners enjoyed the desirable work, pay, and promotion benefits at the Kennedy Space Center. When job prospects there were no longer rosy, they demanded that they be given *retroactively* the right to use the special job and promotion benefits they had won in Florida to displace workers in Kansas City, New York and Los Angeles who had enjoyed no such privileges. As a consequence, a Florida employee who had won unprecedentedly rapid promotion to higher grades within a single year (479a-480a) could have displaced an employee elsewhere who had achieved a like promotion one day later but had waited "8, 10 or 12 years to reach that same position" (717a-718a).

5. A host of rulings recognize that seniority differences and adjustments among employee groups are within the union's and employer's discretion and judgment. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Price v. International Bhd. of Teamsters*, 457 F.2d 605 (3d Cir. 1972); *Bruen v. Electrical Workers Local 492*, 425 F.2d 190 (3d Cir. 1970); *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965); *Hiatt v. New York Central R.R.*, 444 F.2d 1397 (7th Cir. 1971); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975); *Laturner v. Burlington Northern Inc.*, 501 F.2d 593 (9th Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975); *Northeast Master Executive Council v. CAB*, 506 F.2d 97 (D.C. Cir. 1975), *cert. denied*, 419 U.S. 1110 (1975).

Such a retroactive seniority integration would have discriminated against employees throughout the nation, and the lower courts have rightly declined to find that federal law requires a union and company to accede to so unfair a demand. The court below correctly ruled that there is no basis in federal law for attacking the 1970 seniority compromise, which yielded to Florida workers fully integrated seniority after January 1970 but not before.[6]

2. The court below was equally correct in ruling that no liability arises under the Railway Labor Act's fair representation duty, because no financial or other material injury flowed from the union official's attempted diversion of responsibility to the employer where the election result was unaffected thereby. The necessity for an exclusively remedial construction of the RLA is underscored by the

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6. Petitioners claim a conflict with the Second Circuit's ruling in *Jones v. TWA*, 495 F.2d 790 (2d Cir. 1974). But there the nonmembership of the complaining employees had been made the ground for their less favorable seniority. The Second Circuit's ruling was based exclusively on the rule (495 F.2d at 797) that "Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit." The ban on membership-based contract distinctions is found in express terminology of the second proviso to §8(a)(3) of the National Labor Relations Act (29 U.S.C. §158(a)(3)); in the proviso to Section 2, Eleventh (a) of the Railway Labor Act (45 U.S.C. §152 Eleventh); and in the decision in *Radio Officers v. NLRB*, 347 U.S. 17 (1954). Thus the Second Circuit took pains in *Jones* to prevent application of its ruling beyond membership-based contract differences. It emphasized that "*we do not suggest that a union has a duty to dovetail seniority when consolidating two groups of employees*," and "*hold only that union membership was not a proper ground for determining seniority*" (495 F.2d at 798). (Emphasis added.) There is thus no conflict of circuit rulings here.

numerous and definitive rulings construing analogous National Labor Relations Act provisions. Significantly, the latter statute contains a broader enforcement provision authorizing the NLRB, after finding a violation of law, to order "such affirmative action . . . as will effectuate the policies of this Act." Yet it has been repeatedly and emphatically established that even the National Labor Relations Board cannot go beyond redressing specific injuries, to impose punitive sanctions or awards.

The seminal ruling is *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). There the Labor Board had issued an order for payment to the government, by employers who had violated the statute, of amounts the employers had deducted from the back pay of wronged employees which the employees had earned on government work relief projects. This Court reversed the Board, stating (311 U.S. at 10):

> "We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme."

Equally in point is the ruling in *Local 60, United Brotherhood of Carpenters v. Labor Board*, 365 U.S. 651 (1961). There the Labor Board had found unlawful operation of a "closed shop" agreement between the union and the company, and as a part of the remedy had ordered a return by the union of the dues and fees paid by the em-

ployees. This Court rejected that as punitive rather than remedial relief, because it found no basis for the conclusion that the unlawful contract had caused or compelled the payment of the dues which the Labor Board had ordered refunded. The remedy was thus impermissible because it went beyond removing the "consequences of violation":

> ". . . . Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members; and no 'dissipation' of the effects of the prohibited action is achieved. *Labor Board* v. *Mine Workers, supra* 463. The order in those circumstances becomes punitive and beyond the power of the Board. Cf. *Republic Steel Corp.* v. *Labor Board*, 311 U.S. 7, 10" (365 U.S. at 655).

So strong is the policy against punitive relief under federal labor laws, that it has been barred by the Congress even in the tortious damage actions authorized for secondary boycott injuries. That is the construction of § 303 of the Labor-Management Relations Act espoused by this Court in *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964). Section 303 provides that one "injured in his business or property" by the forbidden conduct "shall recover the damages by him sustained." In reversing a District Court punitive damage award this Court's opinion ruled as follows (at 260-261):

> "Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual,

> compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages."

The prohibition on punitive labor law sanctions has been applied even where, unlike here, pre-election misconduct prejudiced the vote by the employees. In *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434 (D.C. Cir. 1972), the Court refused to affirm a Labor Board bargaining order imposed on an employer who had impaired the result of a Board election by discriminatorily transferring eligible voters to another location a week before the voting. The Court noted (at 442) that the violation might have been cured by the holding of a new election "free from the adverse influence of the Company's unlawful action." But (at 443) the order requiring the employer to bargain violated the rule that remedies under the statute are confined to "restoring the status quo . . . to redress the injuries done to employees." The Board's "order would not be remedial but . . . would merely punish the company for its unfair labor practice . . ." (at 444). A similar result was reached in an opinion by Chief Justice Burger (then Circuit Judge), reversing a Labor Board bargaining order which went beyond granting make-whole relief to the

employees injured by the statutory violation. *Local 57, ILGWU v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942. The opinion (at 303, emphasis added) strongly underscores that under the federal statute governing collective bargaining the sole purpose of remedies "*is to rectify the harm done the injured workers, not to provide punitive measures against errant employers.*"

The foregoing rulings confirm that Congress under the NLRA has confined relief for misconduct which has impaired the employees' vote to the holding of a new ballot. The same limitation applies under Title IV of the LMRDA, the 1959 provision protecting the integrity of the election of union officials. Only where misconduct has affected the outcome of such an election may the Secretary of Labor initiate a judicial proceeding (29 U.S.C. §482). And under the statute the only remedy in such a case is "to set aside the invalid election" and hold "a new election under supervision of the Secretary." Nor does the Railway Labor Act provide even in the case of misconduct affecting the outcome of employee balloting any relief beyond the remedial re-balloting measure of the NLRA and the LMRDA. That is the only remedy contemplated by §2, Ninth of the statute (54 U.S.C. §152, Ninth), and the only remedy ever afforded by the National Mediation Board in those instances where its ballot of the employees was impaired by misconduct.

The NLRA and the parallel RLA are statutes wholly remedial in character; for their violation Congress has not authorized the grant of relief beyond the redress of the injury caused. As stated by Chief Judge Biggs in *United Shoe Workers v. Brooks Shoe Mfg., Co.*, 298 F.2d 277, 284 (3d Cir. 1962), "It is the general policy of the federal labor laws . . . to supply remedies rather than punishments." And as Judge Hand long ago ruled in *Western Union Telegraph Co. v. NLRB*, 113 F.2d 992, 997 (2d Cir. 1940), liability under labor law must rest on "proof that 'the unfair labor practice' actually impinged upon the

putative victims and caused them pecuniary damage." Thus, nothing in the Railway Labor Act creates liability for a misstatement to a group of employees prior to their contract balloting which did not impair the ballot result. The Court below correctly ruled (Pet. A.49) that since the misleading statement to the Florida employees could not possibly have altered the result of the overwhelming nationwide ratification vote, it could not create liability under federal labor laws "absent a showing of tangible injury proximately resulting. . . ."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1865.

CHARLES DEBOLES,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; DISTRICT LODGE 142, IAMAW, AFL-CIO; LOCAL LODGE 1776, IAMAW, AFL-CIO

Respondents.

BRIEF OF TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

TABLE OF CITATIONS.

COUNTERSTATEMENT OF QUESTION PRESENTED.

Should this Court grant certiorari to consider whether Trans World Airlines, Inc. (TWA) is liable under the Railway Labor Act, 45 U. S. C. § 152 to employees alleging a breach of their Union's duty of fair representation, where the District Court found, and the Circuit Court concurred, that there were legitimate considerations underlying the difference in seniority status of employees under the same collective bargaining agreement and that TWA neither had any part in nor knew about misrepresentations by the Union to TWA employees at Kennedy Space Center about Union efforts to achieve retroactive system seniority?

COUNTERSTATEMENT OF THE CASE.

This is a Rule 23(b)(2) class action in which plaintiffs are a group of over 300 present Trans World Airlines, Inc. (TWA) employees who were initially hired by TWA at Kennedy Space Center (KSC) during TWA's 1964 through 1971 operation of the space facility. They sued TWA, the International Association of Machinists and Aerospace Workers (IAM), (their exclusive collective bargaining representative), District Lodge 142, and Local Lodge 1776 (the Philadelphia Local where Deboles, the class representative, has been a member since his transfer to Philadelphia), alleging violations of certain provisions of the Railway Labor Act, 42 U. S. C. §§ 151 *et seq.* and a violation of the Union's duty of fair representation. They base their claims on the difference in seniority status accorded KSC employees, as opposed to that accorded TWA employees in the rest of the system, and on alleged misrepresentations made by the Union to TWA employees at KSC about the Union's effort to obtain retroactive system seniority for KSC employees.

In 1963 TWA submitted a bid to the National Aeronautics and Space Administration (NASA) to operate the Florida space facility originally known as the Merritt Island Launch Area and later renamed the Kennedy Space Center. TWA was awarded the contract in 1964. TWA recognized the need for a stable labor force at KSC because of the integral importance of KSC to the national space program. At the time TWA already had a stable relationship with the IAM, which had been certified by the National Mediation Board under the provisions of the Railway Labor Act as the exclusive collective bargaining representative for TWA employees in the job classifications "Mechanics and Related Employees". TWA further believed that labor stability at KSC could be better ensured

if TWA's relations with its KSC employees were governed by the Railway Labor Act rather than the National Labor Relations Act. In addition, TWA wanted to avoid the jurisdictional disputes that had plagued its predecessor at the space installaton. Thus, before beginning operation of the KSC facility TWA indicated to the IAM its desire to recognize the IAM as the bargaining representative at KSC.

Following ratification in January 1964 of the main collective bargaining agreement for TWA employees, TWA and the IAM negotiated a supplemental agreement covering KSC employees, the purpose of which was to maximize the desired stability of the KSC work force. TWA was particularly concerned about wholesale and seasonal "snowbird" [1] transfers from other stations, about the usability of the transferees' skills in light of the uniqueness of many of the job skills required at KSC, and about the disruptive effect which would result from displacement of KSC employees. The 1964 MILA Supplement, thus, provided that new employees hired at KSC would not be placed on the system seniority [2] roster and would not be permitted bid or displacement rights to other system locations. It provided, in addition, that system employees who sought to transfer to KSC could not use their system seniority for any purpose at KSC, and were placed at the bottom of the KSC seniority roster. Although system em-

1. A "snowbird" is one who uses his system seniority to transfer to Florida for the winter.

2. "System seniority" is national seniority by job classification whereby TWA employees are ranked on national seniority system rosters according to their length of service in the particular job classification regardless of the system location where they worked. System seniority gave TWA employees the right to bid for vacancies at other system locations, to bump or displace employees with less classification seniority at other locations in the event of furlough, and the preferential rights to shift assignments and days off within their own system location.

ployees who transferred to KSC continued to accrue system seniority while at KSC, they were required to remain at KSC for one year before they were eligible to bid out.

As a result of the rapid expansion of the TWA workforce at KSC, and the protection from "bidding in" by others elsewhere in the system,[3] higher classifications and lead position slots were attained at KSC much more rapidly than in the TWA system generally. While seasonal layoffs were customary in the rest of the TWA system, KSC employees enjoyed unusual stability and growth as a result of the expansion of the space program because of this protection from "bidding in." The first layoff at the Space Center did not occur until August, 1969.

During negotiation of the 1966 collective bargaining agreement, KSC employees through their Local 773 submitted a proposal to remove the seniority restrictions from the MILA Supplement. When contract negotiations reached an impasse in July, 1966, TWA employees including Space Center employees, went on strike, and KSC was closed for a week. In response to the consideration by Congress, stemming from its concern about the space program, of legislation to impose binding arbitration, Union officials urged KSC employees to return to work while negotiations continued.

Under the terms negotiated for the 1966 Supplemental Agreement, KSC employees could bid for vacancies in the system on a preference basis, i.e., KSC employees would have no displacement rights but would be preferred over new hires at the system location, and system transferees to KSC who had been promoted or attained a lead

3. While employment grew from 300 to approximately 2,000 after TWA commenced operations at the Space Center on April 1, 1964, during the nearly 7 years of the TWA operation only 60 to 90 employees transferred to KSC from the system.

position while at KSC could bid back into the system only at the level at which they had left the system to go to KSC. KSC employees were advised by Gordon of District Lodge 142 that the Union had done the best it could to eliminate the seniority restrictions for KSC employees but that TWA had attached unacceptable conditions. Local 773 recommended ratification, and the 1966 contract was accepted by KSC employees.

At the 1968 opening of negotiations for the 1970 IAM-TWA agreement, both TWA and the IAM submitted proposals containing provisions for retroactive system seniority at KSC. During the course of the negotiations, TWA became concerned about the difficulty of melding job skills between KSC and the rest of the system, a prerequisite to the integration of KSC employees into system seniority. Ultimately an agreement was reached whereby job classifications at KSC were matched with many job classifications in the remainder of the system.

In late June or early July of 1969 TWA submitted a proposal to District Lodge 142 negotiators which would have given retroactive system seniority to KSC employees. A groundswell of opposition to retroactive system seniority for KSC employees appeared, evidenced by petitions generated by IAM members of Local Lodge 1650 in Kansas City and circulated throughout the TWA system. The negotiating committee concluded that the inclusion of such a provision in the contract might prevent ratification and the committee voted to remove the proposal from the bargaining table. However, the proposal was actually kept on the table until the last day or so of negotiations. Another proposal was offered by the Union in the final days of negotiations which provided that KSC employees would begin to accrue system seniority, and system employees would begin to accrue KSC seniority, as of the date of contract ratification.

TWA and the IAM reached final agreement on January 16, 1970, and the contract was submitted for ratification. In terms of its economic provisions and numerous work rule changes the contract was extremely beneficial to the Union.

District Lodge 142 Assistant Chairman James Fowler conducted the ratification meetings at the Space Center and advised the executive board of Local 773 and KSC employees that the Union had done the best it could to obtain retroactive system seniority but that TWA had attached unacceptable conditions. The executive board of the Local spoke neither for nor against the contract and the employees at KSC voted 714-69 in favor of ratification. Even if Fowler had disclosed that system opposition was the actual reason for the Union's failure to agree to the proposal of retroactive system seniority and even if all KSC employees had voted against ratification, the contract still would have been approved by a margin of 3 to 1.

The District Court concluded on the basis of this evidence, that there were legitimate considerations underlying the seniority differences embodied in the 1964 MILA Supplement and, therefore, the seniority distinctions in themselves were not a violation of the Union's duty of fair representation, but that the Union's misrepresentations constituted a breach of its duty of honest and fair representation. The District Court concluded, in addition, that the plaintiff's claim against TWA could not be sustained since there was no evidence that TWA was a party to the deception or even that it was in any way aware of the misrepresentations.

Pursuant to 28 U. S. C. § 1291, plaintiffs appealed the final judgment in favor of TWA entered by the District Court under Federal Rule of Civil Procedure 54(b). Both the plaintiff class and the defendant unions appealed from

the interlocutory order determining liability in favor of plaintiffs and against the defendant unions by permission of the Court of Appeals for the Third Circuit under 28 U. S. C. § 1292(b).

The Court of Appeals affirmed the District Court's rulings that TWA was not liable to the plaintiffs and that the seniority distinctions did not violate the Union's duty of fair representation. It reversed the District Court's finding that the Union's misrepresentations constituted a breach of the Union's duty of fair representation because plaintiffs had failed to show a "tangible injury proximately resulting" from the misrepresentation.

ARGUMENT.

The District Court below concluded, and the Court of Appeals concurred, that TWA had no liability to the plaintiffs in this action. The courts below found that TWA had no liability for the misrepresentations made by Union representatives to the Kennedy Space Center membership because TWA neither participated in nor even knew of the misrepresentations. The District Court also found, and the Court of Appeals affirmed, that there were significant considerations supporting the seniority differences contained in the collective bargaining agreements negotiated between TWA and the Union and, therefore, the mere differences did not constitute a breach of the Union's duty of fair representation. These decisions are amply supported by the evidence, are based upon substantial precedent, and are entirely consistent with other decisions by courts of appeals considering the validity of seniority distinctions between groups of employees governed by a single collective bargaining agreement. Plaintiffs' failure to address these well-founded conclusions of the courts below on the issue of TWA's liability and their proposal to postpone the presentation and discussion of the TWA liability until granted certiorari on the issue of the Union's liability [4] demonstrate that they have no case against TWA worthy of this Court's consideration.

Both the Court of Appeals and the District Court rejected plaintiffs' theories that the seniority differences

4. Plaintiffs' sole reference to the consideration of TWA's liability is found in footnote 4 of their Petition where they state:

> "We have not discussed TWA's liability for executing and enforcing the contracts. That liability is reached only upon a determination that the Union breached its duty in respect to the agreements themselves. We propose to argue issues related to TWA's liability if certiorari is granted. In connection with TWA's liability, see Jones v. Trans World Airlines, Inc., 495 F. 2d 790 (2d Cir. 1974)."

contained in the 1964 TWA-IAM collective bargaining agreement were "arbitrary, discriminatory, or in bad faith," the standard set down by this Court in *Vaca v. Sipes*, 386 U. S. 171, 190 (1967), by which to determine whether a union's conduct violated its duty of fair representation. Following a comprehensive review of the line of decisions of this Court and others upholding the validity of seniority differences among employee groups governed by a single contract and according the union wide latitude in the exercise of its discretion subject to the requirements of good faith and honesty of purpose,[5] the Court of Appeals concluded:

> ". . . this court is persuaded, as was the court below, that the seniority distinctions in the instant case fall within the zone of reasonableness by which a union's conduct must be measured." Petitioners' Appendix at 44.

Both courts concluded that the seniority differences provided for under the collective bargaining agreements at the Space Center were the result of the recognition of pertinent differences between the Space Center operation and the remainder of the TWA system. The seniority differences were justified by TWA's desire for a stable workforce at KSC and its reasonable belief that differences in skills and the probability of "snowbird" transfers between the system and the Space Center would disrupt

5. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *Humphrey v. Moore*, 375 U. S. 335 (1964); *Price v. International Brotherhood of Teamsters*, 457 F. 2d 605 (3d Cir. 1972); *Bruen v. Electrical Workers Local 492*, 425 F. 2d 190 (3d Cir. 1970); *NLRB v. Whiting Milk Corp.*, 342 F. 2d 8 (1st Cir. 1965); *Hiatt v. New York Central R. R.*, 444 F. 2d 1397 (7th Cir. 1971); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F. 2d 853 (8th Cir. 1975); *Lauturner v. Burlington Northern, Inc.*, 501 F. 2d 593 (9th Cir. 1974), *cert. denied*, 419 U. S. 1109 (1975); *Northeast Master Executive Council v. CAB*, 506 F. 2d 97 (D. C. Cir. 1974), *cert. denied*, 419 U. S. 1110 (1975).

Space Center operations unless transfers were minimized. Petitioners' Appendix at 17, 45. Furthermore, the Court of Appeals emphasized that the lack of system seniority at issue was "hardly arbitrarily disadvantageous to Space Center employees" since it provided them security from being "bumped" by system employees when the system faced its more frequent layoffs. Petitioners' Appendix at 45. Finally, the Court of Appeals reasoned that system IAM members would have had reason to complain of the pre-1970 restrictions against their transfer to the greater security available at the Space Center had the 1970 collective bargaining agreement conferred retroactive seniority on KSC employees.

There can be no basis, therefore, for holding TWA liable to the Petitioners for executing and enforcing collective bargaining agreements containing seniority distinctions which stemmed from non-arbitrary, relevant concerns. That TWA and the IAM, after extensive negotiation, were able to reach agreement in 1970 with respect to matching certain KSC job classifications with those in the rest of the system, after over five years of TWA operation of the Space Center, does not alter the fact that reasonable concerns and relevant considerations underlay the seniority distinctions agreed upon in 1964 and continued with moderate modification in 1966.

Petitioners do not take issue with the District Court's conclusion, accepted by the Court of Appeals, that TWA had no liability for whatever misrepresentations were made by Union representatives to the Space Center membership concerning the Unions' diligence in pursuing retroactive system seniority for KSC employees. That TWA never participated in nor had any knowledge of these misrepresentations is amply supported by the evidence.

Furthermore, the decision of the Court of Appeals for the Second Circuit in *Jones v. Trans World Airlines*, 495 F. 2d 490 (2d Cir. 1974), as the court below correctly concluded, is clearly distinguishable from the case at bar. Petitioners' attempt to contrive a conflict among the circuits based upon their broad brush description of the ruling in *Jones* does not merit the attention of this Court. In *Jones*, the court found that the sole basis for the seniority distinctions agreed to by the employer and the union was the union membership, or lack thereof, of the two groups of employees. As the Court of Appeals for the Second Circuit itself stated, *Jones* stands for the limited proposition that

> "[d]iscrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit." 495 F. 2d at 797.

The liability of the employer in *Jones* was predicated solely on its agreement to and implementation of seniority distinctions grounded in arbitrary and invidious considerations. Where, as here, the seniority distinctions are not based upon the arbitrary ground of union membership but, rather, are based upon relevant differences between the two groups of employees, the *Jones* decision is simply not applicable. As the court below aptly concluded:

> "Thus the Second Circuit's decision can give little support to the position of the Space Center employees herein, because the distinctions in seniority did not arise from non-membership in the union but instead were related to meaningful differences between the Space Center and the airline system which were reflected in TWA's policy of discouraging transfers." Petitioners' Appendix at 47.

CONCLUSION.

The findings of the District Court, affirmed by the Court of Appeals, that there was no liability of TWA for whatever misrepresentations were made by Union representatives to their members about their efforts to obtain retroactive system seniority and that the collective bargaining agreements made between TWA and the IAM did not constitute a violation of the Union's duty of fair representation were amply supported by the evidence, based upon substantial precedent and consonant with the other decisions in the courts of appeals reviewing the validity of seniority distinctions between groups of employees governed by the same contract.

For these reasons plaintiffs' petition for a writ of certiorari on the issue of TWA's liability should be denied.

Respectfully submitted,

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